Supreme Court, U.S.
FILED
MAR 31 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1533~~ 70-109

MILAN M. VUITCH, M.D., *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

ROY LUCAS
Four Patchin Place
New York, New York 10011
212-691-2020

E. BARRETT PRETTYMAN, JR.
TIMOTHY J. BLOOMFIELD
815 Connecticut Avenue
Washington, D. C. 20006
212-298-5500

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

INDEX

	Page
Citations to Opinion and Orders Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Amendment, Statutes and Rules Involved	3
Statement	3
Reasons for Granting the Writ	7
Conclusion	19
Appendix A	
Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution	1a
Maryland Code Annotated, Art. 43, §§ 137-139 (Cum. Supp. 1970)	1a
Rules 725, 755 and 1071 of the Maryland Rules of Procedure	4a
Appendix B	
Opinion of Court of Special Appeals of Maryland affirming petitioner's conviction	8a
Appendix C	
Mandate of Court of Special Appeals of Maryland	25a
Appendix D	
Order of Court of Appeals of Maryland denying petitioner's Petition for a Writ of Certiorari	27a
Appendix E	
A. Official Memoranda	28a
B. Petitioner's Tables	39a

TABLE OF AUTHORITIES

CASES: Page

Abodeely v. *Iowa, appeal docketed,* 39 U.S.L.W. 3314 (U.S. Jan. 13, 1971) (No. 1230) 15
Bacheller v. *Maryland,* 3 Md. App. 626, 240 A.2d 623 (Ct. Spec. App. 1968) 12
Bailey v. *Maryland,* 6 Md. App. 496, 252 A.2d 85 (Ct. Spec. App. 1969) 11
California v. *Belous,* 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Prtr. 354 (1969), cert. denied, 397 U.S. 915 (1970) 14, 15, 17
Carnley v. *Cochran,* 369 U.S. 506 (1962) 13
Doe v. *Bolton, appeal docketed,* 39 U.S.L.W. 3333 (U.S. Nov. 14, 1970) (No. 971) 15, 16
Doe v. *Scott,* — F. Supp. —, No. 70-C-395 (N.D. Ill. Jan. 29, 1971) 14
Fay v. *Noia,* 372 U.S. 391 (1963) 9
Griswold v. *Connecticut,* 381 U.S. 479 (1965) 4, 15
Henry v. *Mississippi,* 379 U.S. 443 (1965) 7, 8, 9, 10, 12
Hodgson v. *Minnesota, appeal docketed,* 39 U.S.L.W. 3203 (U.S. Sept. 21, 1970) (No. 729) 15
Hodgson v. *Randall, appeal docketed,* 39 U.S.L.W. 3228 (U.S. Sept. 22, 1970) 15
Iozzi v. *Maryland,* 5 Md. App. 415, 247 A.2d 758 (Ct. Spec. App. 1968) 12
Johnson v. *Zerbst,* 304 U.S. 458 (1938) 13
Kyle v. *Maryland,* 6 Md. App. 159, 250 A.2d 314 (Ct. Spec. App. 1969) 11, 12
Lashley v. *Maryland,* 10 Md. App. 135, 268 A.2d 502 (1960), *appeal docketed,* 39 U.S.L.W. 3347 (U.S. Mar. 8, 1971) (No. 1328) 12, 15
Liner v. *Jafco, Inc.,* 375 U.S. 301 (1964) 8, 13
Love v. *Griffith,* 266 U.S. 32 (1924) 12
Luthardt v. *Maryland,* 6 Md. 251, 251 A.2d 40 (Ct. Spec. App. 1969) 12
McCann v. *Babbitz,* 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed,* 400 U.S. 1 (1970) 14
McCann v. *Babbitz* (II), *appeal docketed,* 39 U.S.L.W. 3362 (U.S. Feb. 16, 1971) (No. 1353) 15
Morrissey v. *Maryland,* 9 Md. App. 470, 265 A.2d 585 (Ct. Spec. App. 1970) 11
NAACP v. *Alabama,* 357 U.S. 449 (1958) 10
New York ex rel Bryant v. *Zimmerman,* 278 U.S. 63 (1928) 9

Page

Parker v. *Illinois*, 333 U.S. 571 (1948) 20
Reagan v. *Maryland*, 4 Md. App. 590, 244 A.2d 623 (Ct. Spec. App. 1968) 11
Reece v. *Georgia*, 350 U.S. 85 (1955) 20
Rodgers v. *Danforth*, *appeal docketed*, 39 U.S.L.W. 3390 (U.S. Mar. 8, 1971) (No. 1402) 15
Roe v. *Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), *appeal docketed*, 39 U.S.L.W. 3151 (U.S. Oct. 16, 1970) (No. 808) 14, 15
Rosen v. *Louisiana Bd. of Medical Examiners*, *appeal docketed*, 39 U.S.L.W. 3302 (U.S. Nov. 27, 1970) (No. 1010) 15
Shrout v. *Maryland*, 238 Md. 170, 208 A.2d 585 (1965) 11
United States v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969, *appeal docketed*, 39 U.S.L.W. 3019 (U.S. Mar. 2, 1970) (No. 84) 14, 15, 16
Ward v. *Maryland*, 9 Md. App. 583, 267 A.2d 255 (Ct. Spec. App. 1970) 10, 11
Whitus v. *Balkcom*, 333 F. 2d 496 (5th Cir. 1964) 13
Woodell v. *Maryland*, 2 Md. App. 433, 234 A.2d 890 (Ct. Spec. App. 1967) 12
Wright v. *Georgia*, 373 U.S. 284 (1963) 8

CONSTITUTIONAL AMENDMENTS, STATUTES AND RULES

Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution 2, 4

Maryland Code Annotated, Art. 43

Section 137 ..... 16, 17, 18
Section 138 17
Section 139 3

Maryland Rules of Procedure

Rule 725 ..... 5, 10, 11, 12
Rule 755 3
Rule 1071 5

MISCELLANEOUS

Page

Bumpass & Westoff, The *"Perfect Contraceptive"* Population, 169 SCIENCE 1177 (1970) 14

Constitution of the World Health Organization, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 16

Fisher, *Criminal Abortion*, in ABORTION IN AMERICA (H. Rosen ed. 1967) 14

8 MOORE, FEDERAL PRACTICE ¶ 12.03[2] 10

M. CALDERONE (ed.), ABORTION IN THE UNITED STATES (1958) 14

P. BEVHARD *et al.*, PREGNACY, BIRTH AND ABORTION (1958) 14

Preliminary Report on Abortions Performed in New York State from July 1–October 31, 1970 (N.Y. State Dep't of Health Dec. 17, 1970) 19

Report on Therapeutic Abortions for Fiscal Year July 1, 1968 to June 30, 1969 18

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No.

MILAN M. VUITCH, M.D., *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

Petitioner respectfully prays that a writ of certiorari issue to the Court of Special Appeals of Maryland to review the judgment affirming the conviction of petitioner in the Circuit Court of Montgomery County, Maryland.

CITATION TO OPINION AND ORDERS BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 10 Md. App. 389 and 271 A. 2d 371, and is attached as Appendix B hereto. The

Mandate of the Court of Special Appeals, which contains the official notation of the denial of a Motion for Reargument and Stay of Mandate, is unreported but attached hereto as Appendix C. The Order of the Court of Appeals of Maryland denying a Petition for Certiorari to the Court of Special Appeals is unreported but attached hereto as Appendix D.

JURISDICTION

The Judgment of the Court of Special Appeals of Maryland was entered on November 24, 1970. A timely Motion for Reargument and Stay of Mandate was filed on December 18, 1970, and was denied on January 22, 1971 (App. C). A timely Petition for Certiorari to the Court of Special Appeals of Maryland was filed on January 28, 1971, and denied by Order of February 9, 1971 (App. D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Under *Henry* v. *Mississippi,* 379 U.S. 443 (1965), can Maryland, consistently with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, foreclose a constitutional attack on the governing statute on the ground that it was not raised pretrial, when it was raised three times during trial, decided by the trial court and raised three times on appeal?

2. Under *Henry* v. *Mississippi, supra,* can Maryland, consistently with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, hold that petitioner forfeited important constitutional rights by failing to comply with a procedural rule not previously clearly announced and never before applied?

CONSTITUTIONAL AMENDMENT STATUTES AND RULES INVOLVED

The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, Maryland Code Annotated, Art. 43, §§ 137-139 (Cum. Supp. 1970) and Rules 725, 755 and 1071 of the Maryland Rules of Procedure are attached hereto as Appendix A.

STATEMENT

Petitioner is a physician licensed to practice medicine in the States of Maryland and New York, the Commonwealth of Virginia and the District of Columbia. He was convicted in the Circuit Court of Montgomery County, Maryland, on charges of having performed an abortion in violation of Maryland law, *i.e.*, at "a location which is not a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene * * * " (Md. Code Ann., Art. 43, § 139 (Cum. Supp. 1970).)[1] A sentence of three years' imprisonment (with two years to be suspended after one year is served) and $5,000 fine was imposed. Subsequent to sentencing, petitioner was admitted to bail pending appeal.[2]

His trial was held in early July 1969. At trial, petitioner, through his counsel, filed a written motion for judgment of acquittal pursuant to Rule 755 of the

---

[1] The Maryland Court of Special Appeals designated the abortion statutes as Md. Code Ann., Art. 43, §§ 149E-G. On July 1, 1970, these statutes were renumbered by Md. Acts of 1970, ch. 736, and now appear at the sections cited herein.

[2] On February 16, 1971, after the Maryland Court of Appeals had denied his Petition for Certiorari, the Circuit Court for Montgomery County admitted petitioner to bail pending the filing and disposition of this Petition.

Maryland Rules of Procedure. This motion was based in part on his contention that the abortion statute under which he was charged is "invalid and unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution." (*Vuitch* v. *Maryland*, 10 Md. App. 389, 394, 271 A.2d 371, 374 (Ct. Spec. App. 1970)). The trial judge denied the motion without comment.

At the close of the evidence, petitioner's counsel renewed this motion, and the trial judge denied it, again without comment. Before sentencing, petitioner's counsel moved for a new trial, and again asserted his constitutional attack upon the statute. In denying relief, the trial court finally commented on the constitutional issues involved:

> The second contention of the Defendant is that the Statute under which Defendant is charged is unconstitutional as being a denial of equal protection of the laws in accordance with the *Griswold* case [*Griswold* v. *Connecticut*, 381 U.S. 479]. The Court does not see that the instant case is comparable factually to *Griswold* and finds no denial here as charged. [*State* v. *Vuitch*, (Mont. Cy. Cir. Ct., Crim. No. 9954), Ruling on Motion For New Trial, dated November 16, 1969.]

On appeal to the Maryland Court of Special Appeals, petitioner reasserted his constitutional challenge to the statute, but the Court refused to decide it. Affirming the conviction, the Court ruled that the "constitutional issues * * * were not properly preserved for appellate review." (10 Md. App. at 397, 271 A.2d at 376.) The Court's ruling was grounded upon its conclusion that:

> The motion for judgment of acquittal is not an appropriate vehicle to challenge the constitution-

> ality, facial or otherwise, of the statute under which the criminal prosecution is initiated. [10 Md. App. at 397, 271 A.2d at 376.]

According to the Court, petitioner thus had effectively waived his right to question the statute under which he was convicted, by reason of his failure to assert his constitutional challenges by a pre-trial motion pursuant to Maryland Rule 725(b), which provides in pertinent part:

> Defenses and objections based on defects in the institution of the prosecution or in the indictment, other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion before trial.

At the same time, however, the Court did acknowledge the public importance of a prompt and conclusive adjudication of the constitutionality of Maryland's abortion statute:

> In concluding that the constitutional questions now sought to be raised were not properly preserved for appellate review, we do not seek to delay the day when these *important public issues* must be squarely met and decided, either by us, or the Court of Appeals of Maryland. [10 Md. App. at 397, 271 A.2d at 376 (emphasis added).]

In a timely Motion for Reargument and Stay of Mandate, filed December 18, 1970, petitioner urged that the case be remanded, pursuant to Maryland Rule 1071,[3] for full adjudication of the substantial con-

---

[3] This Rule is set forth in pertinent part as follows:

> 'If it shall appear to this Court that the *substantial merits of a case will not be determined* by affirming, reversing or modifying the judgment from which the appeal was taken,

stitutional issues involved herein. This motion was based partly on the fact that the procedural rule enforced by the Court was at best unclear and it was therefore unfair to hold that petitioner had forfeited his right to an adjudication of the constitutionality of the statute under which he had been convicted.

Petitioner's Motion for Reargument was also keyed to the observation by the Court of Special Appeals that:

> [I]t would be foolhardy in the extreme to undertake the resolution of such *complex constitutional questions* upon a record as procedurally and substantively deficient as that now before us * * *. [10 Md. App. at 397, 271 A.2d at 376 (emphasis added).]

Accordingly, petitioner sought a remand for the full presentation and development of his challenge on constitutional grounds to the Maryland abortion statute.

Despite its statement that petitioner's case involved constitutional issues of public importance which should be promptly decided, the Court denied petitioner's motion on January 22, 1971, without an opinion.

On January 28, 1971, less than one week later, petitioner filed a Petitioner for Certiorari with the Court of Appeals of Maryland. Petitioner's Petition for Certiorari was denied by that Court on February 9, 1971.

---

or that the *purposes of justice will be advanced by permitting further proceedings* in the cause, either through amendment of the pleadings, introduction of additional evidence, or otherwise, then this Court * * * order the case to be remanded to the lower court. [Emphasis added.]

REASONS FOR GRANTING THE WRIT

I

This petition raises important questions concerning the duty of state courts to pass upon challenges to the constitutionality of state criminal statutes. Charged with the first-line protection of constitutional rights, state courts cannot consistently with prior decisions of this Court fashion new procedural rules and then invoke them without notice to deny an accused the right to test the constitutionality of the governing criminal statute.

That is exactly what occurred in this case. Petitioner sought three times during the trial stages, and three times on direct appeal, to obtain a decision on his claim that Maryland's abortion statute was defective under the Federal Constitution. The Maryland appellate courts have ruled that petitioner waived his constitutional claims by asserting them by motions for acquittal, directed verdict and new trial rather than by a pre-trial motion to dismiss the indictment. We submit that it is a denial of due process and equal protection for Maryland to exact such a high price for failure to observe a procedural rule which is neither clear, reasonable or clearly announced ahead of time.

II

Henry v. *Mississippi*, 379 U.S. 443 (1965), compels either that the judgment below be reversed or that the case be remanded for a hearing on petitioner's constitutional claims. In *Henry*, also a criminal case, petitioner failed to make a contemporaneous objection to the introduction of evidence obtained through an allegedly unlawful search. Petitioner did challenge the

search in a motion for a directed verdict at the close of the State's case, and renewed this motion at the close of all the evidence. The Mississippi Supreme Court affirmed the conviction, holding that petitioner's failure to follow the state procedural rule requiring an objection to illegal evidence at the time it is introduced prevented him from asserting his constitutional claim.

But this Court disagreed,[4] distinguishing between state substantive and procedural grounds for decision:

> [T]he adequate nonfederal ground doctrine is necessary to avoid advisory opinions.
>
> These justifications have no application where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. [*Id.* at 447.]

Referring to earlier cases, the Court cited the proposition that:

> [A] litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. [*Ibid.*]

The Court itself undertook an analysis of the state procedural rule and found that it did serve a legitimate state interest—that of giving the trial court the oppor-

---

[4] The Court's decision in *Henry* was fully consistent with prior opinions which establish that state procedural rules cannot be utilized to frustrate the vindiction of federal rights. *E.g., Liner* v. *Jafco, Inc.*, 375 U.S. 301 (1964), and *Wright* v. *Georgia*, 373 U.S. 284 (1963).

tunity to conduct the trial without tainted evidence. However, the Court also found that the purpose of the rule may have been served by the procedure petitioner actually did use:

> But on the record before us it appears that this purpose of the contemporaneous-objection rule may have been substantially served by petitioner's motion at the close of the State's evidence * * * For at this stage the trial judge could have called for elaboration of the search and seizure argument and, if persuaded, could have stricken the tainted testimony or have taken other appropriate corrective action. [*Id.* at 448.]

Because the record disclosed a possibility that petitioner had waived his objection within the meaning *Fay* v. *Noia*, 372 U.S. 391 (1963), however, the Court remanded to the state courts for a hearing on that issue.

The Court's approach in *Henry* is equally applicable here. Even assuming that Maryland's procedural rule is reasonable, "clearly announced," and serves a legitimate state interest—all of which we dispute—the purpose of the rule was served by petitioner's other motions. No delay was introduced into the trial proceedings, and the trial court had ample opportunity to take any evidence and hear argument it thought was appropriate. This is all that is required of an accused who seeks to assert his constitutional rights. As this Court early stated:

> No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with precision and in due time. [*New York ex rel Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).]

If anything, petitioner's case is stronger than *Henry* v. *Mississippi*. There, the procedural rule enforced by the state Court was clear and established. Here it was neither. To the contrary, the Maryland courts for the first time in this case have held that a challenge to the constitutionality of a statute is lost if not raised by pre-trial motion. The application of a new rule to deprive petitioner of constitutional rights stands in clear conflict with prior decisions of this Court.[5] The Maryland court virtually conceded that this case presented a new application of Rule 725, which is virtually identical to Rule 12 of the Federal Rules of Criminal Procedure,[6] when it stated:

> And while we need not determine the question in this case, it would appear beyond any doubt that such a constitutional challenge would constitute a defense or objection under Rule 755b [sic] "based on defects in the institution of the prosecution or in the indictment other than that it fails to show jurisdiction in the court or to charge an offense"—a defense or objection which may be waived unless presented by motion before trial. [10 Md. App. at 398, 271 A.2d at 376-77 (citing authorities).]

While the Court cites three cases for this point, in none of these was an attack on a statute involved. In *Ward*

---

[5] For example, in *NAACP* v. *Alabama*, 357 U.S. 449 (1958), the Court stated:

> Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights. [*Id.* at 457-58.]

[6] Though the Maryland court noted the similarity between the rules, it failed to note that in federal procedure the unconstitutionality of a statute constitutes a failure of the indictment "to charge an offense," which does not have to be raised pre-trial. 8 MOORE, FEDERAL PRACTICE ¶ 12.03[2].

v. *Maryland,* 9 Md. App. 583, 267 A.2d 255 (Ct. Spec. App. 1970), appellant claimed that the indictment did not charge the common law offense of keeping a disorderly house; in *Morrissey* v. *Maryland,* 9 Md. 470, 265 A.2d 585 (Ct. Spec. App. 1970), appellant was deemed to have waived objection to duplicity in an indictment by failing to file a Rule 725 motion and by not raising the point otherwise at trial; and in *Reagan* v. *Maryland,* 4 Md. App. 590, 244 A.2d 623 (Ct. Spec. App. 1968), appellant properly preserved his objection that the indictment failed to state an offense by a motion for judgment of acquittal.

In a preliminary review of the Maryland cases,[7] we have been able to find no other case in which the Maryland Court refused to consider a challenge such as petitioner's because it had not been raised by a Rule 725 motion, and the State cited no such case in its brief to the Maryland Court of Special Appeals. Indeed, the Maryland Court in several instances reached the merits of constitutional claims similar to petitioner's even though such claims had *not* been raised below by Rule 725 motions. *E.g., Shrout* v. *Maryland,* 238 Md. 170, 208 A.2d 585 (1965) (attack on search warrant); *Bailey* v. *Maryland,* 6 Md. App. 496, 252 A.2d 85 (Ct. Spec. App. 1969) (objection to in-court identification; no motion to exclude or suppress evidence; no objection to admission of evidence); *Kyle* v. *Maryland,* 6 Md. App. 159, 250 A.2d 314 (Ct. Spec.

---

[7] In a successful attempt to secure an order admitting him to bail pending the filing and deposition of the Petition, petitioner promised to file this petition by March 31, 1971 as opposed to May 10, 1971, as permitted by this Court's Rules. Thus petitioner has not had the normal amount of time in which to prepare his Petition.

App. 1969) (double jeopardy objection raised by motion for judgment for acquittal).

In those cases cited where the Court refused to consider attacks on criminal statutes, appellant had not raised the constitutional challenge at all during trial, much less three times.[8] Moreover, in the only cases cited where the Court did pass upon the constitutionality of criminal statutes, the Court did not indicate how the statutes were attacked at trial, whether by a pre-trial motion or otherwise. *Lashley* v. *Maryland*, 10 Md. App. 136, 268 A.2d 502 (Ct. Spec. App. 1960), *appeal docketed*, 39 U.S.L.W. 3347 (U.S. Mar. 8, 1971); *Bacheller* v. *Maryland*, 3 Md. App. 626, 240 A.2d (Ct. Spec. App. 1968). Thus the rule applied here, even if in existence at the time of petitioner's trial, was not "clearly announced" as required by this Court. (*Henry* v. *Mississippi*, *supra*, 379 U.S. at 448, n. 3).

Implicit in the opinion below is the notion that petitioner waived his objection to the Maryland abortion statute. The State argued this, and Rule 725, which the court deemed applicable, provides that certain matters not raised pre-trial are waived.[9]

It is clear, however, that petitioner did not waive his right to contest the validity of Maryland's abortion statute. Where federal constitutional rights are involved, the question of waiver is itself a federal question. *E.g.*, *Henry* v. *Mississippi*, *supra*, 379 U.S. at 447; *Love* v. *Griffith*, 266 U.S. 32, 33-34 (1924); see

---

[8] *Luthardt* v. *Maryland*, 6 Md. App. 251, 251 A. 2d 40 (Ct. Spec. App. 1969); *Iozzi* v. *Maryland*, 5 Md. App. 415, 247 A.2d 758 (Ct. Spec. App. 1968); *Woodell* v. *Maryland*, 2 Md. App. 433, 234 A. 2d 890 (Ct. Spec. App. 1967).

[9] Even so, the rule itself provides that the Court "for cause shown may grant relief from the waiver." (App. A.)

Liner v. *Jafco, Inc.*, 375 U.S. 301 (1964). Waiver has been defined by this Court as the "intentional relinquishment or abandonment of a known right or privilege." *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). This Court has always entertained every reasonable presumption against the waiver of important constitutional rights, finding no waiver absent affirmative conduct evidencing deliberate and conscious rejection of a constitutional guarantee. *E.g., Carnley* v. *Cochran*, 369 U.S. 506 (1962). Obviously, there was no waiver here. While petitioner or his counsel may have picked what the Maryland court determined later to be the wrong procedural vehicle for raising his claim, petitioner certainly did not knowingly abandon it. *E.g., Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964).

The timing of petitioner's trial is important. Although the constitutional issues surrounding abortion statutes have now been defined—but certainly not answered—this was not true in the summer of 1969. Moreover, petitioner did not then have the factual material available now. Cognizant of the present opportunity for full and factual adjudication of these important issues, petitioner sought a remand, permitted by Maryland procedure, for exploration of these matters. The Court of Special Appeals denied this relief, without opinion.

III

The underlying issues are of obvious social and constitutional importance. Questions concerning the constitutionality of Maryland's abortion statute, asserted time and again below, have a direct bearing on extraordinarily important personal decisions and conduct of Maryland women and their families. These questions do not have just academic interest. One national study

showed 4.7 million unwanted births from 1960 to 1965, approximately two million of which occurred among the economically distressed.[10] Moreover, estimates indicate that 200,000 to 1,000,000 unwanted pregnancies each year end in abortions brought about outside of the clinical setting,[11] in situations ofter fraught with danger to health and life of the pregnant woman.

The statute under which petitioner was convicted is subject to serious constitutional question from the standpoint of Maryland women and their families. While women in a number of states have had the benefit of decisions invalidating abortion statutes,[12]

---

[10] This study, co-authored by Professor Charles Westoff of Princeton University, executive director of the Presidential Commission on Population Growth and the American Future, showed the following results:

> [I]n the period 1960 to 1965 there were 4.7 million births that would have been prevented by "perfect contraception." These births represent one-fifth of all births during the period. Approximately 2 million of these unwanted births occurred among the poor and the near-poor * * *. [Bumpass & Westoff, The *"Perfect Contraceptive"* Population, 169 SCIENCE 1177, 1179 (1970).]

[11] Secretly induced abortions are inherently incapable of quantification. Nonetheless, the number is very high. For estimates, see Fisher, *Criminal Abortion*, in ABORTION IN AMERICA 3-6 (H. Rosen ed. 1967); M. CALDERONE (ed.), ABORTION IN THE UNITED STATES 180 (1958); P. BEVHARD *et al.*, PREGNANCY BIRTH AND ABORTION 136-137 (1958).

[12] *California* v. *Belous*, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970); *United States* v. *Vuitch*, 305 F. Supp. 1032 (D.D.C. 1969), *appeal docketed*, 39 U.S.L. W. 3019 (U.S. Mar. 2, 1970) (No. 84); *Roe* v. *Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970) (per curiam), *appeal docketed*, 39 U.S.L. W. 3151 (U.S. Oct. 16, 1970) (No. 808); *McCann* v. *Babbitz*, 310 F. Supp. 293 (E.D. Wis.) (per curiam), *appeal dismissed*, 400 U.S. 1 (1970); *Doe* v. *Scott*, — F. Supp. —, No. 70-C-395 (N.D. Ill. Jan. 29, 1971).

often in cases where the constitutional claims were raised by their physicians,[13] Maryland women and their physicians have thus far been deprived of such an adjudication.[14]

That substantial constitutional issues are involved here needs no elucidation; one court defined the basic question as the "fundamental right of the woman to choose whether to bear children."[15] This Court now has before it at least ten other cases presenting various constitutional aspects of anti-abortion legislation,[16] including one case involving this petitioner,[17] and another involving a statute with the same provision as

---

[13] The standing of a physician to assert both his own rights and those of his patients has gone unquestioned by the lower courts in the context of therapeutic abortion litigation. Reliance is invariably placed on *Griswold* v. *Connecticut*, 381 U.S. 479, 481 (1965). *See, e.g., Roe* v. *Wade*, *supra*, 314 F. Supp. at 1220 n.3.

[14] In *Lashley* v. *Maryland*, 10 Md. App. 135, 268 A.2d 502 (1960), *appeal docketed*, 39 U.S.L.W. 3347 (U.S. Mar. 8, 1971) (No. 1328), the Maryland Court did decide that the state had the constitutional authority to require that abortions be performed by licensed physicians such as petitioner.

[15] *California* v. *Belous*, *supra*, 71 Cal. 2d at 963, 458 P.2d at 199, 80 Cal. Reptr. at 359 (1969).

[16] The cases are: *United States* v. *Vuitch*, *supra*; *Hodgson* v. *Randall*, *appeal docketed*, 39 U.S.L. W. 3228 (U.S. Sept. 22, 1970) (No. 728); *Hodgson* v. *Minnesota*, *appeal docketed*, 39 U.S.L. W. 3203 (U.S. Sept. 21, 1970) (No. 729); *Roe* v. *Wade*, *supra*; *Doe* v. *Bolton*, *appeal docketed*, 39 U.S.L. W. 3333 (U.S. Nov. 14, 1970) (No. 971); *Rosen* v. *Louisiana Bd. of Medical Examiners*, *appeal docketed*, 39 U.S.L. W. 3302 (U.S. Nov. 27, 1970) (No. 1010); *Abodeely* v. *Iowa*, *appeal docketed*, 39 U.S.L. W. 3314 (U.S. Jan. 13, 1971) (No. 1230); *Lashley* v. *Maryland*, *supra*; *McCann* v. *Babbitz* (II), *appeal docketed*, 39 U.S.L. W. 3362 (U.S. Feb. 16, 1971) (No. 1353); *Rodgers* v. *Danforth*, *appeal docketed*, 39 U.S.L. W. 3390 (U.S. Mar. 8, 1971) (No. 1402).

[17] *United States* v. *Vuitch*, *supra*. Argument was heard on this case by the Court on January 12, 1971.

the Maryland statute under which petitioner was convicted here.[18]

The Maryland statute presents constitutional difficulties of significant dimension. As just one example, the statute permits therapeutic abortions if

> (2) There is substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother * * * [Md. Code Ann., Art. 43, § 137 (Cum. Supp. 1970).]

There is substantial question whether such a statutory standard is not unconstitutionally defective for vagueness.[19] Thus on the one hand, physicians may define the concept of "health" broadly along lines suggested by the World Health Organization:

> "Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity."[20]

On the other hand, judges and jurors may interpret the "health" concept narrowly, restricting "mental health" abortions to cases of preexisting psychosis accompanied by institutionalization. The first definition permits therapeutic abortion in cases where a patient represents that a pregnancy is unwanted. The second is highly restrictive and would sanction exceedingly few "mental health" abortions. The vast majority of therapeutic abortions fall between the two extremes, in an area wholly without statutory illumination.

---

[18] *Doe* v. *Bolton*, *supra*. In *Doe*, however, the record does not contain the factual materials now available to a court passing upon the constitutionality of the Maryland statute.

[19] See *United States* v. *Vuitch*, *supra*, 305 F. Supp. at 1034.

[20] *Constitution of the World Health Organization*, in BASIC DOCUMENTS OF THE WORLD HEALTH ORGANIZATION 1 (Geneva 1969 ed.).

Factual materials available now—but not at the time of petitioner's trial—make petitioner's case an ideal vehicle for the constitutional adjudication to which petitioner and other Maryland citizens are entitled. These materials also demonstrate a substantial probability that the Maryland statute is unconstitutional.

The statute requires that therapeutic abortions be performed only "in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene * * *" (Md. Code Ann. Art. 43, § 137 (Cum. Supp. 1970). Maryland confines no other medical procedures solely to accredited hospitals, and there is no rational basis on which therapeutic abortions can be so singled out, particularly since properly induced abortions are safer than ordinary childbirth.[21]

The statute also provides that no person, hospital, or governing board shall be required to approve, permit or perform a therapeutic abortion. (Md. Code Ann., Art. 43, § 138 (Cum. Supp. 1970). When combined with the hospitalization requirements, this provision can effectively deny physicians and their patients access to therapeutic abortions. Accordingly, no hospital is required by the statute to permit staff physicians to perform therapeutic abortion. No hospital is told by the statute or state health department whether to interpret the provisions generously or rigidly. No hospital is forbidden to exclude out-of-state patients or indigent patients. In effect, the statute *explicitly* delegates to the hospital governing boards full authority to abrogate any rights granted to physi-

[21] For a helpful review of pertinent statistics and other materials, see *California* v. *Belous*, *supra*.

cians or patients under permissive provisions of the statute.

As required by the statute,[22] the Maryland Department of Health and Mental Hygiene has maintained data concerning therapeutic abortions under the statute. These data, not available at trial,[23] are now accessible to petitioner and thus can provide the basis for an informed adjudication of the constitutional issues presented.

Certain of the available statistical data have been included as Appendix E hereto.[24] These materials show that, as applied, the hospitalization requirement in the statute has drastically limited the availability of voluntary abortion. Thirteen accredited hospitals reported no therapeutic abortions at all for the first year of the Act, July 1, 1968 to June 30, 1969. Physicians and patients dependent upon these thirteen hospitals were completely denied any rights under the statute.

All accredited hospitals reported only 2134 therapeutic abortions for the same period. By contrast, a nearby state permitting therapeutic abortion on request, in clinics as well as hospitals, recorded an abor-

---

[22] Md. Code Ann., Art. 43, § 137(c) (Cum. Supp. 1970).

[23] The *Report on Therapeutic Abortions for Fiscal Year July 1, 1968 to June 30, 1969* was not released until May 14, 1970, almost a full year after petitioner's trial.

[24] These materials consist of reports by the responsible state official and tables assembled by petitioner from public documents and internal memoranda obtained from the Maternity and Family Planning Section, Division of Maternal and Child Health, Maryland Department of Health and Mental Hygiene.

tion rate 48 times as great.[25] This comparision indicates the extent of the restriction imposed by the Maryland statute. Moreover, the distribution of therapeutic abortions in Maryland for the first year was irregular. Six out of thirty-nine hospitals performed fully 88 per cent of all therapeutic abortions.

As the data indicate, physicians and their patients have been subjected to widely varying therapeutic abortion practices under the Maryland statute. Similarly situated individuals have not been accorded equal rights under the therapeutic abortion law. "Mental health" under the statute means one thing in Montgomery General Hospital and quite another in the Johns Hopkins Hospital. Indeed, "mental health" had a different meaning in 1969 from that in 1970.

This case is ripe for state court adjudication of public issues in which Maryland has a paramount interest. Moreover, the fact that the materials adverted to above were never before available demonstrates that petitioner's failure to develop an evidentiary record at the trial level was due not to any waiver of important constitutional rights, inexcusable neglect, or misjudgment, but rather to the simple unavailability of the materials required.

CONCLUSION

Petitioner has a constitutional right not to be labeled a criminal and incarcerated for violating a statute which offends the Federal Constitution. He also has a

---

[25] *Preliminary Report on Abortions Performed in New York State From July 1—October 31, 1970* (N.Y. State Dep't of Health Dec. 17, 1970). The New York Report, issued by Commissioner Hollis S. Ingraham, M.D., reported 34,175 induced abortions for the first four months under recent legislation in that state. This amounts to a projected 102,525 for twelve months, which is 48.0 times as large as the first year Maryland total of 2,134.

concomitant right, equally important, to contest the validity under the Constitution of the statute under which he has been charged, *Reece* v. *Georgia,* 350 U.S. 85 (1955), and he must be given "a reasonable opportunity to have his federal questions passed upon by the state court." *Parker* v. *Illinois,* 333 U.S. 571, 575 (1948).

Henry v. *Mississippi* came to the Court on direct appeal; and there petitioner had been guilty of a procedural omission clear under state law. This Court remanded to the state court. The Court should do the same here, where petitioner's procedural default, if any, was his failure to comply with a hyper-technical procedural rule announced for the first time in this case. We respectfully submit that the Fourteenth Amendment does not permit so unwitting a forfeiture of important constitutional claims.

Respectfully submitted,

By _____
Roy Lucas
Four Patchin Place
New York, New York 10011
212-691-2020

By _____
E. Barrett Prettyman, Jr.

_____
Timothy J. Bloomfield
815 Connecticut Avenue
Washington, D. C. 20006
212-298-5500

Attorneys for Petitioner

APPENDIX A

Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Maryland Code Annotated, Art. 43, §§ 137-139 (Cum. Supp. 1970)

Abortion

§ 137. Conditions under which termination of pregnancy permitted; records and reports.

(a) No person shall terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth, except that a physician licensed by the State of Maryland may terminate a human pregnancy or aid or assist or attempt a termination of a human pregnancy if said termination takes place in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene and if one or more of the following conditions exist:

(1) Continuation of the pregnancy is likely to result in the death of the mother;

(2) There is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;

(3) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;

(4) The pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur.

(b) In no event shall any physician terminate or attempt to terminate or assist in the termination or attempt at termination of a human pregnancy otherwise than by birth unless all of the following conditions exist:

(1) Not more than twenty-six weeks of gestation have passed (except in the case of a termination pursuant to subsection (a)(1) or where the fetus is dead); and

(2) Authorization therefor has been granted in writing by a hospital abortion review authority appointed by the hospital.

(c) The hospital abortion review authority shall keep written records of all requests for authorization and its action thereon. An annual report of the therapeutic abortions performed in Maryland shall be made by the director of the hospital and its governing board. Such reports shall include the number of requests, authorizations and performances, the grounds upon which such authorizations were granted, and the procedures employed to cause the abortions and such reports shall be forwarded to the joint commission on accreditation of hospitals and the State Board of Health and Mental Hygiene for the purpose of insuring that adequate and proper procedures are being followed in accredited hospitals. Such information, which is not subject to the physician-patient privilege, may be made available to the public. Said reports shall not include the names of the patients aborted. (1968, ch. 470, § 2; 1970, ch. 736.)

§ 138. Refusal to perform or participate in or submit to abortion; refusal of hospital to permit.

(a) No person shall be required to perform or participate in medical procedures which result in the termination of pregnancy; and the refusal of any person to perform or participate in these medical procedures shall not be a basis for civil liability to any person nor a basis for any disciplinary or other recriminatory action against him.

(b) No hospital, hospital director or governing board shall be required to permit the termination of human pregnancies within its institutions and the refusal to permit such procedures shall not be grounds for civil liability to any person nor a basis for any disciplinary or other recriminatory action against it by the State or any person.

(c) The refusal of any person to submit to an abortion or to give consent therefor shall not be ground for loss of any privileges or immunities to which such person would otherwise be entitled nor shall submission to an abortion or the granting of consent therefor be a condition precedent to the receipt of any public benefits. (1968, ch. 470, § 2; 1970, ch. 736.)

§ 139. Unlawful acts.

(a) A person is guilty of a misdemeanor if he

(1) Sells or gives, or causes to be sold or given, any drug, medicine, preparation, instrument, or device for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by a licensed physician in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene; or

(2) Gives advice, counsel, or information for the purpose of causing, inducing, or obtaining a termination of human pregnancy other than by such physician in such a hospital; or

(3) Knowingly assists or causes by any means whatsoever the obtaining or performing of a termination of human pregnancy other than by such physician in such a hospital.

(b) Any person who violates any provision of this section, upon conviction, is subject to a fine of not more than five thousand dollars for each offense, or to imprisonment for not more than three years, or both such fine and imprisonment. The penalties in this section are in addition to and not in substitution for any other penalty or penalties applicable to particular classes of persons under other laws of this State. (1968, ch. 470, § 2; 1970, ch. 736.)

Rules 725, 755 and 1071 of the Maryland Rules of Procedure

MARYLAND RULES OF PROCEDURE

RULE 725. PLEADINGS—MOTIONS—EXCEPTIONS.

a. PLEADINGS.

Pleadings in a criminal proceeding shall be the indictment, the information, or the warrant where a jury trial was prayed before a trial magistrate or an appeal has been taken from a trial magistrate; the pleas of not guilty, not guilty by reason of insanity as provided by statute, guilty, or nolo contendere; the motion to dismiss, and the motion to grant appropriate relief. All other pleas, demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised by the motion to dismiss or to grant appropriate relief.

b. DEFENSES AND OBJECTIONS BEFORE TRIAL.

Defenses and objections based on defects in the institution of the prosecution or in the indictment, other than that it fails to show jurisdiction in the court or to charge

an offense, must be raised by motion before trial. Such motion shall include all such defenses and objections then available to the accused. Failure to present any such defense or objection as herein provided shall constitute a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment to charge an offense shall be noticed by the court at any time during the proceeding. Any defense or objection capable of determination without the trial of the general issue may be raised before trial by motion.

c. Motion.

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit.

d. Hearing on Motion.

A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. All issues of fact raised by such motion may be determined by the court without a jury on affidavit or in such other manner as the court may direct.

e. Effect of Determination.

If a motion is determined adversely to the accused he may plead. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment, it may order that the accused be held in custody, or that his bail be continued for a specified time pending the filing of a new indictment.

f. Exceptions.

Exceptions shall be governed by the provision of Rule 522 (Objections to Ruling or Order—Method of Making), 510 (Reservation of Points for Court In Banc), and 564 b 3 (Trial by Court—No Instructions, Objections or Exceptions).

RULE 755. MOTION FOR JUDGMENT OF ACQUITTAL

a. Supersedes Motion for Directed Verdict.

The motion for a directed verdict of not guilty and the motion for an instruction that the evidence is insufficient in law to sustain a conviction are abolished and the motion for judgment of acquittal shall be used in their place.

b. When Made.

A motion for judgment of acquittal on one or more counts, or one or more degrees of an offense, may be made by an accused at the close of the evidence offered by the State, or may be made at the close of all the evidence, whether or not such motion was made at the close of the evidence offered by the State. If the motion is not granted at the close of the evidence offered by the State, the accused may offer evidence without having reserved the right to do so, but by so doing, he withdraws his motion.

c. Action by Court.

If the court on such motion or on its own motion determines that a judgment of acquittal should be granted, it shall direct the clerk to enter a judgment of acquittal on one or more counts, or one or more degrees of an offense which by law is divided into degrees, and to note that it has been entered by the direction of the court. If the case is tried before a jury it shall not be necessary for the jury by its foreman, or otherwise, to render a verdict.

RULE 1071. REMAND.

a. For Further Proceedings.

If it shall appear to this Court that the substantial merits of a case will not be determined by affirming, reversing or modifying the judgment from which the appeal was taken, or that the purposes of justice will be advanced by permitting further proceedings in the cause, either through amendment of the pleadings, introduction of additional evidence, or otherwise, then this Court, instead of entering a final order affirming, reversing or modifying the judgment from which the appeal was taken, may order the case to be remanded to the lower court. Upon remand to the lower court, such further proceedings shall be had by amendment of the pleadings, introduction of additional evidence, making of additional parties, or otherwise, as may be necessary for determinating the action upon its merits as if no appeal had been taken and the judgment from which the appeal was taken had not been entered; provided, however, that the order entered by this Court in remanding said case, and the opinion of this Court on which said order is passed, shall be conclusive as to the points finally decided thereby. In such an order remanding a case, this Court will express the purpose for so remanding and in its opinion filed with said order will determine all questions which may have been properly presented.

b. In Criminal Case.

If in an appeal in a criminal action this Court shall reverse the judgment for error in the judgment or in the sentence, this Court will remand the case to the lower court in order that such court may pronounce the proper judgment or sentence.

APPENDIX B

MILAN M. VUITCH v. STATE OF MARYLAND

[No. 32, September Term, 1970.]

Decided November 24, 1970.

MURPHY, C.J., delivered the opinion of the Court.

Maryland Code, Article 43, Sections 149E, F, and G contain the law of this State governing the commission of abortions. Section 149E provides, *inter alia*, that no person shall terminate a human pregnancy otherwise than by birth, with the exception that a physician licensed in Maryland may do so:

> "* * * in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene and if one or more of the following conditions exists:
>
> (1) Continuation of the pregnancy is likely to result in the death of the mother;
>
> (2) There is a substantial risk that continuation of the pregnancy would gravely impair the physical or mental health of the mother;
>
> (3) There is substantial risk of the birth of the child with grave and permanent physical deformity or mental retardation;
>
> (4) The pregnancy resulted from a rape committed as a result of force or bodily harm or threat of force or bodily harm and the State's Attorney of Baltimore City or the county in which the rape occurred has informed the hospital abortion review authority in writing over his signature that there is probable cause to believe that the alleged rape did occur."

Section 149E further provides that no physician shall terminate a human pregnancy otherwise than by birth, unless all of the following additional conditions exist:

(1) not more than twenty-six weeks of gestation has passed, except in the case of pregnancy likely to result in the death of the mother, or where the fetus is dead, and

(2) authorization therefor has been granted in writing by a hospital abortion review authority appointed by the hospital.

Section 149E provides that the hospital abortion review authority shall keep written records of all requests for authorization and its action thereon; and that hospitals file annual reports of therapeutic abortions performed therein, setting forth the number of requests, authorizations and performances, and the grounds upon which such authorizations were granted and the procedures employed to cause the abortions, the reports to be forwarded to the joint commission on accreditation of hospitals and the State Board of Health and Mental Hygiene "for the purpose of insuring that adequate and proper procedures are being followed in accredited hospitals."

Section 149F provides that no person or hospital shall be required to participate in terminating any human pregnancies. Section 149G provides that a person is guilty of a misdemeanor if he:

"(1) Sells or gives, or causes to be sold or given, any drug, medicine, preparation, instrument, or device for the purpose of causing, inducing or obtaining a termination of human pregnancy other than by a licensed physician in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene; or

(2) Gives advice, counsel, or information for the purpose of causing, inducing or obtaining a termination of human pregnancy other than by such physician in such a hospital; or

(3) Knowingly assists or causes by any means whatsoever the obtaining or performing of a termination of human pregnancy other than by such physician in such a hospital."

Appellant Dr. Milan Vuitch, a physician licensed to practice in Maryland, New York, Virginia, and the District of Columbia, was charged by criminal information with having violated the Maryland abortion statute (Section 149G (3)) in that he "unlawfully did knowingly assist and cause the obtaining of and performing of a termination of a human pregnancy of Rebekah Jayne Dodson at 8204 Grubb Road, Chevy Chase, Montgomery County, Maryland, a location which is not a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene * * *."

No objection to the criminal information, or motion to dismiss it, was filed prior to trial under Maryland Rule 725b.[1] The case went to trial before a jury. After the State had completed its case-in-chief, appellant filed a

---

[1] "Defenses and objections based on defects in the institution of the prosecution or in the indictment other than that it fails to show jurisdiction in the court or to charge an offense, must be raised by motion before trial. Such motion shall include all such defenses and objections then available to the accused. Failure to present any such defense or objection as herein provided shall constitute a waiver thereof. Lack of jurisdiction or the failure of the indictment to charge an offense shall be noticed by the Court at any time during the proceeding. Any defense or objection capable of determination without the trial of the general issue may be raised before trial by motion."

The Rule is, with one minor exception, identical to Federal Rule of Criminal Procedure 12 (b)(2).

written motion for a judgment of acquittal (Maryland Rule 755) on the ground (a) that the State's evidence was legally insufficient to support a guilty verdict, and (b) that "Section 149G of Article 43 * * *, making it a crime to terminate human pregnancy, other than by a licensed physician in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene which is the sole legal basis * * * [for the charge] is an unwarranted discrimination against this Defendant, a physician licensed by the State of Maryland, in favor of practitioners of medicine in accredited and licensed hospitals; the sweep of the statute is unnecessarily broad and invades the area of protected freedoms of both the pregnant woman and the Defendant, a licensed physician, in the private pursuit of their lives and duty, and is without compelling State interest sufficient to justify this encroachment upon personal liberty, and, consequently, Section 149G * * * is invalid and unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, * * *." In support of his motion, appellant presented oral argument on the question of the legal sufficiency of the evidence to support a guilty verdict; he presented no argument whatsoever in support of his constitutional claims, and the court denied the motion without commenting thereon. Appellant then offered evidence in support of his defense that he did not commit an abortion on Miss Dodson, and by so doing he withdrew his motion. Rule 755b. At the end of the entire case, appellant orally renewed the motion, again without advancing any argument to support his constitutional claims, and again the court denied the motion without commenting thereon. The jury found Dr. Vuitch guilty and he was sentenced to pay a $5,000 fine and to imprisonment for three years, with a proviso for suspension of sentence and probation after serving one year.

I

On appeal, Dr. Vuitch contends that "the conviction is void because of the facial unconstitutionality of Section 149G." More particularly, he claims that in requiring that pregnancies be terminated only in designated hospitals, Section 149G "is void for vagueness, uncontrolled delegation of legislative authority, and unjustifiable discrimination with respect both to physicians and to their patients." He contends that Section 149G is constitutionally violative of the fundamental rights of the patient and her physician under the Fourteenth Amendment, in that it prohibits the free exchange of ideas by way of advice and treatment between physician and patient and their freedom and privacy of association; it prohibits physicians from practicing medicine according to the highest standards of medical practice and interferes with their personal freedom in the conduct of their profession; it interferes with the fundamental constitutional right of a woman to choose whether to bear children; and it constitutes an unreasonable and arbitrary discrimination between abortions on the one hand and all other types of surgery on the other.[2]

The State contends that the question of the alleged unconstitutionality of Section 149G is not properly before us because the motion for judgment of acquittal, through which appellant sought to raise the issue, permits us to consider only the legal sufficiency of the evidence to prove the crime alleged, and not the constitutionality of the statute under which the criminal information was filed. The State further contends that the constitutional ques-

---

[2] Appellant's constitutional arguments on appeal are considerably broader than the grounds asserted in the motion for judgment of acquittal, and they are enlarged upon and extended in an extremely able brief filed by *amici curiae*—organizations and individuals expressing a vital interest in the case, included among which are the Association for the Study of Abortion, Inc., and the Planned Parenthood Association of Maryland, Inc.

tion was waived in any event for failure of appellant to raise it prior to trial by motion to dismiss the criminal information under Maryland Rule 725b (see footnote 1).

Under Maryland Rule 755a the motion for judgment of acquittal supersedes and takes the place of the motion for a directed verdict of not guilty. Maryland Code, Article 27, Section 593, which implements the right of the trial judge under Section 5 of Article 15 of the Maryland Constitution to pass upon the sufficiency of the evidence (*see Giles v. State,* 229 Md. 370, and *Williams* v. *State,* 5 Md. App. 450), expressly provides that the motion for judgment of acquittal is based "on the ground that the evidence is insufficient in law to justify * * * conviction * * *"; and that if the motion is denied, "the defendant may have a review of such ruling on appeal."[3] Without question, the office of the motion for judgment of acquittal is essentially limited to challenging the legal sufficiency of the evidence to support a guilty verdict; the motion seeks the obtention of a court-entered judgment of acquittal of the offense with which the accused stands charged. On appeal, when reviewing the refusal of the trial judge to grant the motion in a jury case, it is our *limited* function to determine whether the evidence shows directly or supports a rational inference of the facts to be proved, from which the jury could fairly be convinced, beyond a reasonable doubt, *of the defendant's guilt of the offense charged. Pressley* v. *State,* 244 Md. 664; *Williams* v. *State, supra.* In other words, as more particularly stated in *Devers and Webster* v. *State,* 9 Md. App. 366, 368:

> "When a motion for judgment of acquittal is made in a jury case it is the function of the lower court to

[3] The constitutional provision reads:

> "In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."

> determine whether or not the evidence before it is sufficient in law to sustain a conviction. If it determines that it is, it should deny the motion and submit the case to the jury; if it determines that it is not, it should grant the motion and the case does not reach the jury. It is the function of this Court when the question is properly before it, to determine whether the lower court erred in denying a motion for judgment of acquittal. The test to be applied is whether the evidence shows directly or supports a rational inference of the facts to be proved, and from which the jury could fairly be convinced, beyond a reasonable doubt, of the defendant's guilt of the offense charged. If there was such evidence there would be no error in denial of the motion; if there was no such evidence, denial of the motion would be reversible error. * * *"

The motion for judgment of acquittal is not an appropriate vehicle to challenge the constitutionality, facial or otherwise, of the statute under which the criminal prosecution is initiated. Indeed, appellant's constitutional defense is not directed to a determination of his guilt of the offense charged; rather, it asserts, not as a matter of the sufficiency of evidence, but as a matter of constitutional law, that the State is without constitutional authority to criminally charge him with having terminated a human pregnancy outside of a licensed and accredited hospital. So viewed, we hold that the motion for judgment of acquittal was not the proper motion by which to test the constitutionality of the Maryland abortion statute. The law of other jurisdictions is in accord. *See Heartsill* v. *State*, 341 P. 2d 625 (Okla.); *State* v. *Perkins*, 92 A. 1 (Vt.); *Cohen* v. *State*, 65 S. E. 1096 (Ga.); 23-A C.J.S. *Criminal Law*, p. 361. *Cf. United States* v. *Weissman*, 266 U.S. 377.

In concluding that the constitutional questions now sought to be raised were not properly preserved for ap-

pellate review, we do not seek to delay the day when these important public issues must be squarely met and decided, either by us, or the Court of Appeals of Maryland. But it would be foolhardy in the extreme to undertake the resolution of such complex constitutional questions upon a record as procedurally and substantively deficient as that now before us—one in which the constitutional questions, though readily apparent prior to trial, were raised for the first time after the State had concluded its case-in-chief, and then only by an inappropriate motion (generally alleging unconstitutionality along a front far more limited in thrust than that presently sought to be aired), submitted without comment, or illuminating argument. Whether the trial judge actually considered appellant's constitutional claims cannot be ascertained from the record since in denying the motion he made no comment thereon, and may well have concluded, quite properly, that the constitutional questions could not be raised at that juncture of the proceedings by motion for judgment of acquittal. Of course, nothing is better settled than the rule that a question as to the constitutionality of a statute will not be considered on appeal when not properly raised and decided by the lower court. *Luthardt* v. *State*, 6 Md. App. 251; *Iozzi* v. *State*, 5 Md. App. 415; *Woodell* v. *State*, 2 Md. App. 433.

We find no merit in appellant's suggestion that because the criminal information did not specify that he was a physician he could not raise the constitutional questions by pretrial motion under Rule 725b, but only by motion for judgment of acquittal, after evidence had been adduced at the trial to show that he was a medical doctor. We think it too obvious to require discussion that the question of the constitutionality of that section of the statute under which appellant was charged plainly implicated a "defense or objection" available to him prior to trial under Rule 755b which was "capable of determination without the trial of the general issue"; as such,

it was a question appropriately raised by pretrial motion. And while we need not determine the question in this case, it would appear beyond any doubt that such a constitutional challenge would constitute a defense or objection under Rule 755b "based on defects in the institution of the prosecution or in the indictment other than that it fails to show jurisdiction in the court or to charge an offense"—a defense or objection which may be waived unless presented by motion before trial. *See Ward* v. *State*, 9 Md. App. 583; *Morrissey* v. *State*, 9 Md. App. 470; *Reagan* v. *State*, 4 Md. App. 590. While the failure of an indictment or information to charge an offense is clearly jurisdictional and is properly raised at any time, *Baker* v. *State*, 6 Md. App. 148, the Maryland cases resolve the question whether an offense is charged by analyzing the allegations in the indictment in relation to the statute or law charging the offense. *See Putnam* v. *State*, 234 Md. 537; *Seidman* v. *State*, 230 Md. 305; *Johnson* v. *State*, 223 Md. 479; *Kellum* v. *State*, 223 Md. 80; *Kares* v. *State*, 215 Md. 396; *State* v. *Lassotovitch*, 162 Md. 147; *Ward* v. *State, supra; Morrissey* v. *State, supra*. If the indictment so properly charges the offense, a defense based on the ground that the statute under which the prosecution was brought is unconstitutional does not affect the jurisdiction of the court to try and decide the case. *See Medley* v. *Warden*, 214 Md. 625; *Superintendent* v. *Calman*, 203 Md. 414; *Loughran* v. *Warden*, 192 Md. 719. That the criminal information in this case properly charged all requisite elements of an unlawful abortion under Section 149G (3) is undisputed; that the Circuit Court for Montgomery County was vested with jurisdiction in the sense of power and authority to try the case is likewise beyond question.

In *Lashley* v. *State*, 10 Md. App. 136, we reviewed cases from other jurisdictions involving the constitutionality of State abortion laws but because the appellant in *Lashley* lacked standing to challenge the constitutionality of

the Maryland abortion law, we found it unnecessary to consider the matter on the merits. We did, however, conclude in that case that it was within the police power of the State to outlaw the commission of abortions that are not performed by qualified physicians. Whether it is within the police power of the State to require that physicians perform abortions only in accredited and licensed hospitals, or whether the State is otherwise empowered to circumscribe the commission of abortions by physicians as it has done under the present statute, involve mixed questions of fact and constitutional law, rather than merely facial issues of constitutionality. We believe such issues are most appropriately determined upon pretrial motion and on a record there to be made which would provide the relevant evidentiary background so essential to place the constitutional questions in proper focus and perspective, and thus to assure a reasoned constitutional decision.[4] This is not to say that a physician charged with having committed an unlawful abortion under the statute may not, if he chooses, limit his attack to the facial constitutionality of the law, and produce no evidence; but if he does he will likely be met with the presumption which favors the constitutionality of duly enacted statutes and the rule that such statutes will not be declared unconstitutional unless they plainly contravene the federal or State constitutions, a reasonable doubt being enough to sustain constitutionality.[5] *Iozzi* v. *State, supra;*

---

[4] For example, while appellant has undertaken to attack as unconstitutional the alleged delegation of power to the Joint Commission on Accreditation of Hospitals, there is nothing in the record to show who or what that body is or what standards, if any, it follows in determining whether a particular hospital should be accredited.

[5] The force of the presumption may well be tempered by the holding of the Supreme Court in *Bates* v. *City of Little Rock*, 361 U.S. 516, 524, that "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

Bacheller v. *State*, 3 Md. App. 626; *Woodell* v. *State*, *supra*. Of course, the State is entitled to produce evidence on behalf of the validity of challenged legislation, *United States* v. *Carolene Products*, 304 U. S. 144; and, in this connection, we fully concur in the language in *Borden's Farm Products Co.* v. *Baldwin*, 293 U. S. 194, 213, that "it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint or upon an equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the questions clearer."

As heretofore indicated, because of the failure of appellant to properly preserve the constitutional questions for appellate review, we do not reach them in this case.[6] To the extent that the constitutional question was considered on the motion for new trial, we do not deem the denial of the motion to be properly before us. *Pinkney* v. *State*, 9 Md. App. 23; *Johnson* v. *State*, 3 Md. App. 105.

II

Contrary to appellant's further contention, we think there was evidence before the jury sufficient in law to sustain a conviction; hence, the trial judge did not err in denying appellant's motion for judgment of acquittal.

Evidence was adduced through the testimony of Miss Dodson showing that she had sexual intercourse on nu-

---

[6] In a written ruling denying appellant's motion for a new trial, the lower court said:

> "The second contention of the Defendant is that the statute under which Defendant is charged is unconstitutional as being a denial of equal protection of the laws in accordance with the *Griswold case* (*Griswold* v. *Connecticut*, 381 U.S. 479). The Court does not see that the instant case is comparable factually to *Griswold* and finds no denial here as charged."

merous occasions with Wayne Mills between August 5, 1968 and September 1, 1968; that her menstrual period did not occur on September 1, 1968, as expected; that in the latter part of September, and during October and November, she experienced morning sickness (which she described as an inability to eat and vomiting); and that she decided to have an abortion. As a result of a conversation with Mills, Miss Dodson called Dr. Vuitch and made an appointment with him for November 21, 1968; that on that date she went to his office where he had her disrobe and lie down for a physical examination, which included an examination of her vagina; that Dr. Vuitch told her she was "a little sick in the tummy" and that she should return on November 23 with $300.00; that at 3:00 p.m. on November 23 she did return to his office, at which time he gave her a shot in the thigh, placed her on the operating table, and proceeded to work on her vagina with instruments; that appellant left the room to answer a knock on the door and upon his return, told her that the person knocking was her boyfriend; that thereafter he gave her another shot, continued working, and after he said he was finished there was more knocking on the door; and that Dr. Vuitch told her that the police had arrived and she should tell them that she was there for treatment of an infection and otherwise was not to say anything. Miss Dodson was then taken by Mills to Holy Cross Hospital for an examination, where she remained until her discharge on November 25. She testified that after the operation performed upon her by the appellant her pelvic area became flat. Although she had not had a menstrual period from August 5 to November 23, she commenced vaginal bleeding after the operation was completed on the 23rd.

Wayne Mill's testimony confirmed Miss Dodson's statements as to the sexual intercourse between them and their conversation which resulted in the call being made to Dr.

Vuitch for an appointment. Mills testified that Miss Dodson told him in September that she thought she was pregnant; that he took her to appellant's office on November 21, returned to pick her up, and drove her there again on November 23. After leaving Dr. Vuitch's office on November 23, Mills was stopped by several police officers. According to his testimony, he talked with them, as a result of which he returned alone to appellant's office, knocked on the door, and thereafter left without having been allowed inside. Mills returned to a police officer who was waiting nearby. Another police officer then "came back with papers" and in company with three police officers, Mills gained admittance to Dr. Vuitch's office.

Dr. Rosa Lee testified that she examined Miss Dodson in the emergency room of Holy Cross Hospital on the afternoon of November 23, 1968; that Dodson was having a miscarriage at that time; that she found slight to moderate bleeding during her pelvic examination of Dodson and also found the uterus somewhat enlarged and hard; that it was her opinion that the size and condition of the uterus were inconsistent with a three-month pregnancy; but that she was unable to form an opinion based upon her examination as to whether an instrument abortion had been performed on Miss Dodson. Dr. Lee testified that she recovered a small piece of placental tissue from Dodson's vagina which she characterized as the aftermath of the product of conception. The tissue was sent to Dr. Robert McCullough, a pathologist.

Dr. McCullough testified that the tissue submitted to him by Dr. Lee was the product of conception derived from the foetus and the mother. He could express no opinion, however, as to the length of time that the tissue had been disconnected from a living source.

The hospital records were introduced in evidence. The final diagnosis contained therein showed that Miss Dodson had a "complete abortion."

Police Lieutenant Treadwell testified to his arrival at appellant's office on November 23 and that later on that day, at the hospital, he recovered $300.00 from Miss Dodson's possession.

It was stipulated that appellant's office was not a licensed and accredited hospital.

The case for the defense included testimony of Dr. Robert Levin that a week prior to trial he examined the previously mentioned placental tissue and thought it was more compatible with a spontaneous miscarriage than an instrumented abortion. He stated that the tissue was connected with a twelve-week pregnancy. He was unable to express an opinion whether Dodson had an instrumented termination of pregnancy.

Appellant, testifying on his own behalf, denied performing an abortion on Miss Dodson. He testified to his examination, diagnosis, and treatment of her for mild pelvic inflammatory disease, and that he conducted a test on her for pregnancy which was negative.

We think there was legally sufficient evidence before the jury showing directly or supporting a rational inference that appellant performed an instrumented abortion on Miss Dodson in his office on November 23. There was legally sufficient direct (as well as circumstantial) evidence of Dodson's pregnancy and of appellant's criminal agency in terminating it, and the case was properly submitted to the jury. *See Vois* v. *State,* 5 Md. App. 200; *Reeder* v. *State,* 4 Md. App. 705.

III

Appellant urges that various rulings by the trial court regarding the admissibility of evidence were prejudicially erroneous and require reversal of the conviction.

A.

Appellant contends that during the State's redirect examination of Miss Dodson the following question and answer revealed "damaging hearsay testimony":

> "Q. You testified on cross-examination that you told Dr. Vuitch that it couldn't have been your boyfriend [who had knocked on the door of Dr. Vuitch's office on November 23]. Why did you tell him that?
>
> A. Because I was told that if Dr. Vuitch knew that the boyfriend was still around that he wouldn't have performed an abortion."

Appellant moved to strike the answer on the ground that it was not responsive to the question. The court, in denying the motion, stated that the answer was responsive.

The record discloses that the question was directed to further developing a line of inquiry initiated by appellant on cross-examination. The answer was responsive, and as this was the express basis of objection, we find no error in the trial court's refusal to strike it from the testimony. *See Wilt* v. *Wilt*, 242 Md. 129; *Metz* v. *State*, 9 Md. App. 15; *Bitzer* v. *State*, 4 Md. App. 415; Maryland Rule 522 d 2.

B.

Appellant contends that the court erred when it permitted Mills, on his direct examination by the State, over objection, to give as his reason for taking Dodson to appellant's office on November 23 a hearsay statement of her possible motive for wanting to go there. Specifically, he objects to the following responses by Mills on the ground that they constitute a hearsay "furnishing [of] Dodson's reason for her appointment with the doctor":

> "She thought she was pregnant and he was going to do something, I guess.

* * *

> The reason I took here there is cause she thought she was pregnant, I don't know whether she was or not, but she thought * * *."

These responses, while clearly hearsay as to Dodson's reason for going to appellant's office, revealed Mills's purpose and motivation in driving her there. We think the trial judge should have given the jury an instruction limiting the testimony to its non-hearsay use; we do not, however, think his failure to do so, there being no request therefor, amounts to reversible error.

C.

Appellant contends that the lower court committed prejudicial error when it permitted Dr. Lee to answer an improper hypothetical question by making factual assumptions not supported by evidence in the case.

The record discloses that the hypothetical question was directed toward obtaining Dr. Lee's expert opinion, based on the assumed facts, as to whether Dr. Vuitch "working on the vagina around three o'clock was involved in a procedure that could have caused the termination of a human pregnancy." The witness, after indicating that she could express an opinion based upon reasonable medical certainty, stated:

> "A. If this patient was pregnant three months according to her period and if she was really pregnant until she stepped into the office and she came to our hospital directly from that office and I saw her—when I saw her she was not pregnant and when she walked into that office, if she was pregnant, she was not pregnant when I saw her so it must have happened something in between.
>
> Q. Thank you.
>
> A. If she was really pergnant or not, I cannot tell. If she was having a discharge at that time before she

went to the doctor's office, that I cannot tell. She was pregnant and she was having a miscarriage, that was sure, because I saw the tissue and she was bleeding. Prior to that, I cannot tell."

We see no need to discuss the propriety of the hypothetical question since it is obvious that Dr. Lee's carefully guarded and qualified answer in no way prejudiced the appellant and without prejudice shown, an erroneous hypothetical question is not grounds for reversal. *Wolfinger* v. *Frey*, 223 Md. 184.

Judgment affirmed; appellant to pay costs.

APPENDIX C

Mandate

COURT OF SPECIAL APPEALS OF MARYLAND

No. 32, September Term, 1970

MILAN M. VUITCH

v.

STATE OF MARYLAND

Appeal from the Circuit Court for Montgomery County.

Filed: March 16, 1970.

November 24, 1970: Opinion by Murphy, C.J.; Judgment Affirmed. Appellant to Pay Costs.

December 18, 1970: Notice of Appearance filed by Roy Lucas, Esq., E. Barrett Prettyman, Jr., Esq. and Timothy J. Bloomfield, Esq. as counsel for Appellant.

Motion for Re-Argument and Stay of Mandate filed by counsel for Appellant.

December 23, 1970; Statement of Amici Curiae in Support of Re-Argument filed by attorneys for Amici Curiae.

December 31, 1970: Answer to Motion for Re-Argument and Stay of Mandate filed by Appellee.

January 5, 1971: Letter to Court striking appearance of William Adelson and Leonard T. Kardy.

January 22, 1971: Motion for Re-Argument denied.

STATEMENT OF COSTS:

In Circuit Court:	
Record	$ 20.00
Stenographer's Costs	467.25
In Court of Special Appeals:	
Filing Record on Appeal	$ 20.00
Printing Brief for Appellant	291.50
Reply Brief and Brief of Amicus Curiae typewritten	
Portion of Record Extract—Appellant	
Appearance Fee—Appellant	
Printing Brief for Appellee	$259.24
Portion of Record Extract—Appellee	
Appearance Fee—Appellee	

STATE OF MARYLAND, Set:

I do hereby certify that the foregoing is truly taken from the records and proceedings of the said Court of Special Appeals.

In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this twenty-second day of January, A. D. 1971.

JULES A. ROMAN
Clerk of the Court of Special Appeals of Maryland.

Costs shown on this Mandate are to be settled between counsel and NOT THROUGH THIS OFFICE

APPENDIX D

IN THE COURT OF APPEALS OF MARYLAND

Miscellaneous Docket No. 298

September Term, 1970

(No. 32, September Term, 1970—Court of Special Appeals)

MILAN M. VUITCH, M.D.

v.

STATE OF MARYLAND

Order

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED by the Court of Appeals of Maryland that the said petition be, and it is hereby, denied.

/s/ HALL HAMMOND
Chief Judge

Date: February 9, 1971.

APPENDIX E

A. The following memoranda present official materials with respect to therapeutic abortions in Maryland.

STATE OF MARYLAND

DEPARTMENT OF HEALTH AND MENTAL HYGIENE
DEPARTMENT OF HEALTH

301 West Preston Street Baltimore, Maryland 21201
Area Code 301 383-3010

NEIL SOLOMON, M.D., Ph.D.
Secretary

MEMORANDUM

To: All Local Health Officers

Attention: MCH Directors, Family Planning Clinicians, Directors of Public Health Nursing, Supervisors, Administrative Supervisors or Senior Public Health Nurses

From: J. King B. E. Seegar, Jr., M.D.
Chief, Maternity and Family Planning Section
Division of Maternal and Child Health

Re: Report on Therapeutic Abortions for Fiscal Year July 1, 1968 to June 30, 1969

A review of the statistics covering the first fiscal year July 1, 1968 to June 30, 1969 of the therapeutic abortion law revealed the following. An annual report was submitted by thirty-nine (39) non-federal general hospitals in Maryland having an obstetrical and/or gynecological service. Twenty-six (26) of these hospitals reported a total of 2,134 therapeutic abortions while six (6) of the thirteen (13) hospitals reporting no abortions did not participate because of religious affiliations (Table I).

Table I

Number of therapeutic abortions performed and number of deliveries over 500 grams on Obstetrical Service—reported by 39 non-federal general hospitals in Maryland, 1969 Fiscal Year.

	No. of Therapeutic Abortions Performed	No. of Deliveries of 500 grams on OB Service
26 Hospitals reporting 1 or more therapeutic abortions	2,134	38,072
13 Hospitals reporting no therapeutic abortions	0	15,728
Total 39 reporting hospitals	2,134	53,800

The extent of active participation varied widely among the various hospitals. Six (6) of the twenty-six (26) hospitals reporting therapeutic abortions accounted for eighty-eight percent (88%) of the total abortions performed but only twenty-four percent (24%) of the deliveries reported by the thirty-nine (39) hospitals.

Of the total of 2,134 women receiving therapeutic abortions, 1,556 or seventy-three percent (73%) were classified by the reporting hospitals as private patients and 578 or twenty-seven percent (27%) as hospital service patients. Fourteen of the twenty-six hospitals actively participating in the program reported one or more therapeutic abortions on service patients. However, three large hospitals, all located in Baltimore City, carried over ninety percent (90%) of this service patient load. We were not pleased with this phase of the hospital reporting since it was hoped this would reveal the socio-economic background of the patients. A number of the county hospitals however reported all as private patient though it was requested that M.A.P. patients and those given prenatal care through a

hospital or health department clinic be classified as hospital service patients. This obviously was not done and would alter the statistics.

Out-of-state residents were served by thirteen (13) of these twenty-six (26) hospitals. Of the total of 2,134 therapeutic abortions performed during the year, 321 were for nonresidents of the state, while 1,813 or eighty-five percent (85%) were for Maryland residents. For Maryland residents, this represented approximately twenty-six (26) therapeutic abortions per 1,000 live births. This is an approximation since data on births is reportable on an annual basis while abortion reporting is on a fiscal basis.

The primary indication for which therapeutic abortions were performed was mental health. This constituted 91.6% of the total abortions performed (Table II).

Table II

Number of Therapeutic Abortions Performed by Indication—Maryland 1969 Fiscal Year

Indication	Number of Abortions	Percent of Totol
Mental Health	1955	91.6
Physical Health	122	5.7
Congenital Defects	39	1.8
Rape	15	0.7
Physical and Mental	3	0.2
Total	2134	100.0

A review of the method used to perform these abortions is interesting but disappointing because of incomplete and inaccurate reporting. Information on the morbidity of the method used was available for only 2,018 of the total 2,134 therapeutic abortions performed (Tables III and IV).

Table III

Number of Therapeutic Abortions Performed by Method—Maryland 1969 Fiscal Year

Method	No. of Abortions	Percent of Total
Intrauterine Injection	932	43.7
Dilatation and Curettage	493	23.1
Suction Curettage	445	20.8
Hysterotomy	142	6.7
Hysterectomy	97	4.5
Not stated	25	1.2
Total	2134	100.0

Table IV

Morbidity by Method Used, Therapeutic Abortions; Maryland 1969 F.Y.

Method	Number of Therapeutic Abortions	Number with Morbidity	Percent with Morbidity
Intrauterine Injection	916	27	2.9
Dilatation and Curettage	430	7	1.6
Suction Curettage	445	2	0.4
Hysterotomy	131	32	24.4
Hysterectomy	96	20	20.8
Total	2018*	88	4.4

*Because of incomplete reporting, information on method used and morbidity associated with each method was available for only 2,018 of the total of 2,134 therapeutic abortions performed.

As one might expect, the more major procedures showed the highest morbidity, and suction curettage was lowest possibly because this method was reserved for the earliest pregnancies. We are also happy to announce that in the entire series there was no maternal mortality reported.

An analysis of requests for therapeutic abortions again was most disappointing. The inaccuracies here were so blatant as to completely preclude reporting on this phase. In several cases, after subtracting the out-of-state requests and out-of-state abortions performed from the total requests and total abortions performed, the results showed more abortions performed on residents of Maryland than there were requested.

Because of these deficiencies and the urgent need for more information regarding the problem of therapeutic abortion, it is hoped that with the cooperation of the physicians and hospitals we can institute an anonymous individual reporting form for each patient. This, it is hoped, may be sent to the Division of Maternal and Child Health of the Maryland State Department of Health which, in turn, will develop from them an annual report for each hospital. This will be sent to the Secretary of Health and Mental Hygiene.

We hope that by analyzing these reports it will be possible to identify the groups of individuals requiring abortions. We should then be in a more favorable position to reach and prevent pregnancies among them, thus exercising the primary role of the Health Department, namely preventive medicine.

STATE OF MARYLAND

DEPARTMENT OF HEALTH AND MENTAL HYGIENE
DEPARTMENT OF HEALTH

301 West Preston Street Baltimore, Maryland 21201
Area Code 301 383-3010

NEIL SOLOMON, M.D., Ph.D.
Secretary

MEMORANDUM

To: Hospital Administrators;
Chiefs of OB-GYN Service,
and physicians

From: J. King B. E. Seegar, Jr., M.D.
Chief, Maternity and Family Planning Section
Division of Maternal and Child Health

Re: Report on Therapeutic Abortions for Fiscal Year July 1, 1969 to June 30, 1970

This review of statistics for fiscal year 1970 is based on reports sent to the Department of Health and Mental Hygiene by the thirty-nine non-federal general hospitals in Maryland having an obstetrical and/or gynecological service. These are the same thirty-nine hospitals that reported in fiscal year 1969, the first year after liberalization of the abortion law. Some data from that previous report are included here when comparisons may be of interest. This report was compiled with the cooperation of Doctor Frances Jean Warthen of the Maryland Center for Health Statistics.

Table I

Number of therapeutic abortions performed and number of live births on obstetrical services—reported by 39 non-federal general hospitals in Maryland, 1970 fiscal year

	Number of Therapeutic Abortions Performed	Number of Live Births on OB Service
27 Hospitals reporting one or more therapeutic abortions	5,530	39,138
12 Hospitals reporting no therapeutic abortions	0	15,304
Total	5,530	54,442

Twenty-seven hospitals out of the thirty-nine reported performing at least one abortion. A total of 5,530 therapeutic abortions were performed by them, an increase of 159% over the figure of 2,134 for last year. Some other therapeutic abortions have been performed on Maryland residents in Washington, D. C., in federal hospitals here and in nearby states, but since these institutions do not report to us the total number is not known. Again, the total of 54,442 deliveries does not represent all deliveries in the state or all deliveries to Maryland residents, but only deliveries at the thirty-nine hospitals.

Table II

Number and percent of therapeutic abortions performed, grouped by extent of participation of hospitals, 1970 fiscal year.

	Percent	Number of Total
6 hospitals reporting most abortions	4,079	73.8
21 Other hospitals reporting	1,451	26.2
Total	5,530	100.0

This year the six hospitals that performed the most abortions did 73.8% of the total, as contrasted to last year

when the six did 88% of the total. This suggests a trend towards distributing the therapeutic abortion load more evenly among hospitals.

Table III

Number and percent of therapeutic abortions performed and deliveries by type of patient, private and service, 1970 fiscal year.

	Abortions		Deliveries	
	Number	Percent	Number	Percent
Private patients	3,839	69.4	38,087	70.0
Service patients	1,691	30.6	16,355	30.0
Total	5,530	100.0	54,442	100.0

Of the total of 5,530 therapeutic abortions performed, 69.4% were on private patients and 30.6% of service patients. These proportions are almost identical with those for deliveries in the thirty-nine hospitals. Althouglh the classification of patients into private and service categories is not extremely precise (some of the smaller county hospitals consider all of their patients to be private patients) it does give a general impression of the equity with which socio-economic groups are served.

Table IV

Therapeutic abortions performed by residence of patient, 1970 fiscal year.

	Number	Percent
Maryland Resident	4,934	89.2
Out-of-state Resident	596	10.8
Total	5,530	100.0

Out of the total of 5,530 abortions performed, 4,934, or 89.2%, were on patients giving Maryland addresses, while 596, or 10.8%, gave out-of-state addresses. Since 15% of

the patients last year were from out of state, there seems to be a tendency for hospitals to restrict services to residents of the State.

Table V

Therapeutic abortions performed by indication for abortion, 1970 fiscal year.

Indication	Number	Percent
Mental Health	5,340	96.6
Physical Health	115	2.1
Congenital Defects	35	.6
Rape	19	.3
Other	21	.4
Total	5,530	100.0

The primary indication for which therapeutic abortions were performed was again mental health, with 96.5% of all abortions performed for this reason. This is a slight increase over the 91.6% reported for last year.

Table VI

Therapeutic abortions performed by method used, 1970 fiscal year.

Method	Number	Percent
Intrauterine saline injection	1,972	35.7
Surgical curettage	1,123	20.3
Suction curettage	1,843	33.3
Hysterotomy	429	7.8
Hysterectomy	163	2.9
Not stated	0	0
Total	5,530	100.0

There are several trends shown in the methods used to perform therapeutic abortions. Use of the saline technique has fallen from 43.7% of the total last year to 35.7% of

the total this year. There was also a slight decline in use of surgical curettage. The most striking change has been our increase in the use of suction curettage from 20.8% of the total last year to 33.3% of the total this year.

Table VII

Morbidity and mortality by method used, for therapeutic abortions performed, 1970 fiscal year.

Method	Number of Abortions Analyzed	No. with Morbidity	Percent with Morbidity	No. of Deaths
Intrauterine saline	1,308	52	4.0	3
Surgical curettage	641	8	1.2	0
Suction curettage	1,461	7	.5	0
Hysterotomy	302	28	9.3	0
Hysterectomy	155	32	20.6	0
Total	3,867	127	3.3	3

Because of incomplete reporting of complications, information on morbidity was available for only 3,867 of the total of 5,530 therapeutic abortions performed. Although the data must be interpreted with some caution, there were differences in morbidity rates for the different methods used. Major surgical procedures such as hysterectomy and hysterotomy had the highest morbidity rates while curettage had the lowest. To a large extent this may reflect differences in length of gestation at which the different procedures were used.

There were three deaths reported this year (none last year) and all were associated with the use of the saline technique. This is a total of three deaths over the two years of experience, or in 7,664 therapeutic abortions. All three deaths were attributed to sepsis and shock. Two

occurred in the hospitals following the procedure, and one occurred at home following discharge.

This may reflect several important problems both of which could contribute to the morbidity and mortality. These are the difficulty in arranging psychiatric consultation and obtaining hospital beds. Together these result in delays which may force the patient to accept the more hazardous procedure of saline injection rather than the more benign suction curettage.

B. The following tables have been compiled by petitioner from public documents and internal memoranda obtained from the Maternity and Family Planning Section Division of Maternal and Child Health, Maryland Department of Health and Mental Hygiene.

TABLE I: THERAPEUTIC ABORTIONS IN MARYLAND FISCAL YEAR 1969 — BY COUNTY

COUNTY	Therapeutic Abortion Ratio [2]	Total Population	Number of Abortions	Number of Births	Per Cent Total Abortions	Per Cent Total Births
Baltimore (City)	80.1	900,500	1908	23831	89.4	44.7
Anne Arundel	18.2	285,000	25	1376	1.2	2.6
Montgomery	16.2	510,600	109	6710	5.1	12.6
Dorchester	14.2	28,900	5	351	0.2	0.7
Wicomico	11.9	52,900	19	1594	0.9	3.0
Baltimore	9.9	609,300	49	4973	2.3	9.3
Washington	3.5	101,600	6	1734	0.3	3.3
Kent	3.1	15,800	1	325	* [3]	0.6
Calvert	2.9	19,900	1	341	*	0.6
Talbot	2.6	22,100	2	782	0.1	1.5
Frederick	1.8	82,900	2	1142	0.1	2.1
Carroll	1.4	67,400	1	710	*	1.3
Prince George's	1.2	637,500	1	4174	0.2	7.8
Harford	0.8	110,600	1	1192	*	2.2
Allegany	—	82,600	0	1700	0.0	3.2
Cecil	—	52,400	0	696	0.0	1.3
Charles	—	45,300	0	509	0.0	1.0
Garrett	—	20,600	0	360	0.0	0.7
St. Mary's	—	45,600	0	654	0.0	1.2
Somerset	—	18,600	0	106	0.0	0.2
Worcester	no hosp.	24,100	—	—	—	—
Caroline	no hosp.	19,600	—	—	—	—
Queen Anne's	no hosp.	17,500	—	—	—	—
Howard	no hosp.	60,000	—	—	—	—
State Total	40.1	3,832,100	2134	53442	100.0%	100.0%

[1] Includes only those births and abortions occurring in State-licensed general hospitals. Howard, Queen Anne's, Caroline and Worcester Counties lack such facilities.

[2] Abortion ratio is the number of therapeutic abortions performed per 1000 births.

[3] Percentages indicated by (*) are less than 0.1%.

TABLE II: THERAPEUTIC ABORTIONS IN MARYLAND
FISCAL YEAR 1969 — BY HOSPITAL

COUNTY	HOSPITAL	Number of Abortions	Number of Births	Therapeutic Abortion Ratio
Baltimore City	Baltimore City Hosps.	70	2391	29.3
Baltimore City	Bon Secours Hosp.	0	1147	—
Baltimore City	Church Home and Hosp.	75	1134	57.1
Baltimore City	Franklin Square Hosp.	2	459	4.4
Baltimore City	Johns Hopkins Hosp.	1178	2284	515.8
Baltimore City	Lutheran Hosp. of Md.	48	1330	36.1
Baltimore City	Maryland General Hosp.	17	1237	13.7
Baltimore City	Mercy Hosp. Inc.	0	1484	—
Baltimore City	Provident Hosp.	68	438	155.3
Baltimore City	St. Agnes Hosp.	0	2852	—
Baltimore City	Sinai Hosp. of Baltimore	392	4052	96.7
Baltimore City	South Baltimore Gen. Hosp.	3	921	3.3
Baltimore City	Union Memorial Hosp.	34	1481	23.0
Baltimore City	University of Maryland Hosp.	21	2441	8.6
Allegany	Memorial Hosp.	0	946	—
Allegany	Miners Hosp. Corp.	0	87	—
Allegany	Sacred Heart Hosp.	0	667	—
Anne Arundel	Anne Arundel General Hosp.	25	1376	18.2
Baltimore	Greater Baltimore Medical Cntr.	49	2398	20.4
Baltimore	St. Joseph Hosp.	0	2575	—
Calvert	Calvert County Hosp.	1	341	2.9
Carroll	Carroll County General Hosp.	1	710	1.4
Cecil	Union Hosp. of Cecil County	0	696	—
Charles	Physicians Memorial Hosp.	0	509	—
Dorchester	Cambridge Hosp. Inc.	5	351	14.2
Frederick	Frederick Memorial Hosp.	2	1142	1.8
Garrett	Garrett Memorial Hosp.	0	360	—
Harford	Harford Memorial Hosp.	1	1192	0.8
Kent	Kent and Queen Anne's Hosp.	1	325	3.1
Montgomery	Holy Cross Hosp. of Silver Spg.	0	3645	—
Montgomery	Montgomery General Hosp. Inc.	4	371	10.8
Montgomery	Suburban Hosp. Assoc. Inc.	94	1642	57.2
Montgomery	Washington Sanitarium & Hosp.	11	1052	10.5
Prince George's	Prince George's General Hosp.	5	4174	1.2
St. Mary's	St. Mary's Hosp.	0	654	—
Somerset	Edward W. McCready Memorial Hosp.	0	106	—
Talbot	Memorial Hosp., Easton, Md.	2	782	2.6
Washington	Washington County Hosp. Assn.	6	1734	3.5
Wicomico	Peninsula General Hosp.	19	1594	11.9

TABLE III: THERAPEUTIC ABORTIONS IN CITY OF BALTIMORE FISCAL YEAR 1969 — BY HOSPITALS

HOSPITAL	Therapeutic Abortion Ratio	Number of Abortions	Number of Births	Per Cent Abortions	Per Cent Births
Johns Hopkins	515.8	1178	2284	61.7	9.6
Provident	155.3	68	438	3.6	1.8
Sinai	96.7	392	4052	20.5	17.0
Church Home & Hosp.	57.1	75	1314	3.9	5.5
Lutheran of Md.	36.1	48	1330	2.5	5.6
Baltimore City Hosps.	29.3	70	2391	3.7	10.0
Union Memorial	23.0	34	1481	1.8	6.2
Maryland General	13.7	17	1237	0.9	5.2
University of Maryland	8.6	21	2441	1.1	10.2
Franklin Square	4.4	2	459	0.1	1.9
South Baltimore General	3.3	3	921	0.2	3.9
Bon Secours	—	0	1147	0.0	4.8
Mercy	—	0	1484	0.0	6.2
St. Agnes	—	0	2852	0.0	12.0
Total City	80.1	1908	23831	100.0%	100.0%

TABLE IV: THERAPEUTIC ABORTIONS IN MARYLAND
FISCAL YEAR 1970 — BY COUNTY

County	Therapeutic Abortion Ratio	Number of Abortions	Number of Births	Per Cent Total Abortions	Per Cent Total Births
Baltimore (City)	192.4	4684	24347	84.7	44.7
Allegany	7.6	13	1720	0.2	3.2
Anne Arundel	106.2	145	1365	2.6	2.5
Baltimore	39.1	217	5549	3.9	10.2
Calvert	2.9	1	346	* 2	.6
Carroll	2.8	2	722	*	1.3
Dorchester	28.9	9	311	0.2	0.6
Frederick	5.1	6	1173	0.1	2.2
Kent	6.0	2	334	*	0.6
Montgomery	41.5	292	7041	5.3	12.9
Prince George's	1.2	5	4035	*	7.4
St. Mary's	3.3	2	605	*	1.1
Talbot	34.7	28	807	0.5	1.5
Washington	4.8	8	1673	0.1	3.1
Wicomico	74.1	119	1606	2.2	2.9
Cecil	..	0	591	0.0	1.1
Charles	..	0	545	0.0	1.0
Garrett	..	0	285	0.0	0.5
Harford	..	0	1286	0.0	2.4
Somerset	..	0	101	0.0	0.2
State Total	101.6	5533	54442	100.0%	100.0%

TABLE V: THERAPEUTIC ABORTIONS IN MARYLAND FISCAL YEAR 1970 — BY HOSPITAL

County	Hospital	Number of Abortions	Number of Births	Therapeutic Abortion Ratio
Baltimore City	Baltimore City Hosps.	398	3001	132.6
Baltimore City	Bon Secours Hosp.	0	1107	—
Baltimore City	Church Home and Hosp.	403	1234	326.6
Baltimore City	Franklin Square Hosp.	176	404	435.6
Baltimore City	Johns Hopkins Hosp.	1630	2156	756.0
Baltimore City	Lutheran Hosp. of Md.	427	1414	302.0
Baltimore City	Maryland General Hosp.	306	1290	237.2
Baltimore City	Mercy Hosp. Inc.	0	1285	—
Baltimore City	Provident Hosp.	204	318	641.5
Baltimore City	St. Agnes Hosp.	0	2863	—
Baltimore City	Sinai Hosp. of Baltimore	915	4082	224.2
Baltimore City	South Baltimore Gen. Hosp.	77	1320	58.3
Baltimore City	Union Memorial Hosp.	54	1391	33.8
Baltimore City	University of Md. Hosp.	94	2482	37.9
Allegany	Memorial Hosp.	13	886	14.6
Allegany	Miners Hosp. Corp.	0	53	—
Allegany	Sacred Heart Hosp.	0	781	—
Anne Arundel	Anne Arundel Gen. Hosp.	145	1365	106.2
Baltimore Cnty.	Greater Balt.Med. Cntr.	217	2986	72.7
Baltimore Cnty.	St. Joseph Hosp.	0	2563	—
Calvert	Calvert County Hosp.	1	346	2.8
Carroll	Carroll Cnty. Gen. Hosp.	2	722	2.8
Cecil	Union Hosp. of Cecil Cnty.	0	591	—
Charles	Physicians Memorial Hosp.	0	545	—
Dorchester	Cambridge Md. Hosp. Inc.	9	311	28.9
Frederick	Frederick Memorial Hosp.	6	1173	5.1
Garrett	Garrett Memorial Hosp.	0	285	—
Harford	Harford Memorial Hosp.	0	1286	—
Kent	Kent and Queen Anne's Hosp.	2	334	6.0
Montgomery	Holy Cross Hosp. of Silver Spg.	0	3844	—
Montgomery	Montgomery Gen. Hosp. Inc.	6	401	15.0
Montgomery	Suburban Hosp. Assoc. Inc.	248	1635	151.7
Montgomery	Washington Sanitarium & Hosp.	38	1161	32.7
Prince George's	Prince George's Gen. Hosp.	5	4035	1.2
St. Mary's	St. Mary's Hosp.	2	605	3.3
Somerset	Edward W. McCready Mem. Hosp.	0	101	—
Talbot	Memorial Hosp., Easton, Md.	28	807	34.7
Washington	Washington Cnty. Hosp. Assn.	8	1673	4.8
Wicomico	Peninsula Gen. Hosp.	119	1606	74.1

TABLE VI: THERAPEUTIC ABORTIONS IN CITY OF BALTIMORE FISCAL YEAR 1970 — BY HOSPITALS

Hospitals	Therapeutic Abortion Ratio	Number of Abortions	Number of Births	Per Cent Abortions	Per Cent Births
Johns Hopkins	756.0	1630	2156	34.8	8.9
Provident	641.5	204	318	4.4	1.3
Franklin Square	435.6	176	404	3.8	1.7
Church Home & Hosp.	325.6	403	1234	8.6	5.1
Lutheran of Md.	302.0	427	1414	9.1	5.8
Maryland General	237.2	306	1290	6.5	5.3
Sinai	224.2	915	4082	19.5	16.8
Baltimore City Hosps.	132.6	398	3001	8.5	12.3
South Baltimore General	58.3	77	1320	1.6	5.4
Union Memorial	38.8	54	1391	1.2	5.7
University of Maryland	37.9	94	2482	2.0	10.2
Bon Secours	—	0	1107	0.0	4.5
Mercy	—	0	1285	0.0	5.3
St. Agnes	—	0	2863	0.0	11.8
Total City	192.4	4684	24347	100.0%	100.0%

Supreme Court, U.S.
FILED
JUN 17 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-109

No. ~~1533~~

MILAN M. VUITCH, M.D.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS B. BURCH,
Attorney General of Maryland,
FRANCIS X. PUGH,
Assistant Attorney General
of Maryland,
One South Calvert Bldg.,
Baltimore, Maryland 21202,
For Respondent.

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	PAGE
Preliminary Comments	1
Question Presented	1
Constitutional Amendment, Statutes and Rules Involved	2
Statement	2
Argument:	
The constitutionality of a statute requiring, inter alia, abortions to be performed only in a licensed and accredited hospital, was not properly raised at trial nor preserved for appellate review, where no attempt was made to raise this issue until the conclusion of the State's case; where the issue was attempted to be raised without presentation or proffer of any evidence or argument; where the issue was attempted to be raised by a motion challenging the sufficiency of the evidence to sustain a conviction; and where the issue was attempted to be raised in violation of a rule requiring it to be raised prior to trial	4
Conclusion	9
Appendix A:	
Chapter 63, Section 2, of the Laws of Maryland of 1852, codified as Article 27, Section 649, Annotated Code of Maryland (1939)	1a.
Appendix B:	
Rule 3, General Rules of Practice and Procedure of Maryland	2a

Table of Citations

Cases

Bonneville v. State, 206 Md. 302, 111 A. 2d 669 (1955)	7
Cowman v. State, 12 Md. 236 (1858)	7
Ellis v. Dixon, 349 U.S. 458	5, 8
Foote v. State, 59 Md. 264 (1883)	7
Gray v. State, 4 Md. App. 175, 241 A. 2d 909 (1968)	8

PAGE

Griswold v. Connecticut, 381 U.S. 479 9
Henry v. Mississippi, 379 U.S. 443 (1965) 4, 5
Martel v. State, 221 Md. 294, 157 A. 2d 437, cert. den. 363 U.S. 849 (1960) 7
Parker v. North Carolina, 397 U.S. 790 (1970) 5
State v. Cherry, 224 Md. 144, 167 A. 2d 328 (1961) 8
State v. Lassotovitch, 162 Md. 147, 159 A. 362 (1932) 7
Sullivan v. Little Hunting Park, 396 U.S. 229 5
United States v. International Union, 352 U.S. 567 8
Williams & McClelland v. State, 5 Md. App. 450, 247 A. 2d 909 (1968) 8
Zorach v. Clauson, 343 U.S. 306 5

Statutes

Annotated Code of Maryland:
Article 27, Section 649 (1939) 2, 1a
Article 43, Sections 137-139 (Cum. Supp. 1970) 2
Laws of Maryland of 1852:
Chapter 63, Section 2 ..... 2, 1a, 7
United States Constitution:
14th Amendment 2

Miscellaneous

Federal Rule of Criminal Procedure:
Rule 12 (b) (2) 5
General Rules of Practice and Procedure:
Rule 3 ..... 2, 2a, 7
Gould, Criminal Pleading in Maryland, page 74 (Vail-Ballou Press, 1936) 7
Maryland Rules of Procedure:
Rule 725 ..... 2, 2a, 7
Rule 725 (b) 4, 7
Rule 755 ..... 2, 3, 4, 7
Rule 1071 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1533

MILAN M. VUITCH, M.D.,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY COMMENTS

This Brief in Opposition to the Petition for Writ of Certiorari is filed pursuant to the request of this Honorable Court.

QUESTION PRESENTED

Was the constitutionality of a statute properly raised at trial or preserved for appellate review, where no attempt was made to raise this issue until the conclusion of the

State's case; where the issue was attempted to be raised without presentation or proffer of any evidence or argument; where the issue was attempted to be raised by a motion challenging the sufficiency of the evidence to sustain a conviction; and where the issue was attempted to be raised in violation of a rule requiring it to be raised prior to trial?

CONSTITUTIONAL AMENDMENT, STATUTES AND RULES INVOLVED

The due process and equal protection clauses of the 14th Amendment to the United States Constitution; Maryland Code, Annotated, Article 43, Section 137-139 (Cum. Supp. 1970), and Rules 725, 755 and 1071 of the Maryland Rules of Procedure were included as Appendix A to Petitioner's brief. Chapter 63, Section 2, of the Laws of Maryland of 1852, codified as Article 27, Section 649, Annotated Code of Maryland (1939), and Criminal Rule 3 of the General Rules of Practice and Procedure of Maryland, are attached hereto, respectively, as Appendix A and Appendix B.

STATEMENT

Petitioner is a physician licensed to practice medicine in the States of Maryland and New York, the Commonwealth of Virginia and the District of Columbia. He was convicted in the Circuit Court of Montgomery County, Maryland, on charges of having performed an abortion in violation of Maryland law, *i.e.*, at "a location which is not a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene * * *" (Maryland Code Annotated, Article 43, Section 139 (Cum. Supp. 1970)). A sentence of three years' imprisonment (with two years to be suspended after one year is served) and $5,000 fine was imposed. Subsequent

to sentencing, petitioner was admitted to bail pending appeal.

At the trial evidence was introduced showing, *inter alia*, that Petitioner had performed an abortion on November 23, 1968 on one Rebekah Jane Dodson, in his office which was not a licensed or accredited hospital. No challenge to the constitutionality of the statute was made by Petitioner until the close of the State's case, when he attempted to raise the issue by a written motion for judgment of acquittal pursuant to Rule 755 of the Maryland Rules of Procedure. This Rule relates only to sufficiency of evidence. The motion was denied without comment. Thereafter Petitioner offered evidence and by so doing, under the Rule, the motion was withdrawn. (See Appendix A in Petitioner's brief.)

Petitioner testified that he did not perform any abortion and that the girl in fact was not pregnant, despite contradictory testimony from a pathologist he called as a witness. No evidence was introduced or proffered with respect to the constitutionality of the abortion statute. At the end of the trial the above motion was renewed and was again denied without comment.

Following denial of his motion for a new trial, Petitioner appealed to the Maryland Court of Special Appeals. The court held that the constitutional challenge was not properly preserved for appellate review since Maryland law requires the issue to be raised by motion prior to trial and since the "complex constitutional questions" could not be resolved in the absence of any evidence in the record. Petitioner's subsequent motion for remand and petition for certiorari in the Maryland Court of Appeals were denied.

ARGUMENT

THE CONSTITUTIONALITY OF A STATUTE REQUIRING, INTER ALIA, ABORTIONS TO BE PERFORMED ONLY IN A LICENSED AND ACCREDITED HOSPITAL, WAS NOT PROPERLY RAISED AT TRIAL NOR PRESERVED FOR APPELLATE REVIEW, WHERE NO ATTEMPT WAS MADE TO RAISE THIS ISSUE UNTIL THE CONCLUSION OF THE STATE'S CASE; WHERE THE ISSUE WAS ATTEMPTED TO BE RAISED WITHOUT PRESENTATION OR PROFFER OF ANY EVIDENCE OR ARGUMENT; WHERE THE ISSUE WAS ATTEMPTED TO BE RAISED BY A MOTION CHALLENGING THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN A CONVICTION; AND WHERE THE ISSUE WAS ATTEMPTED TO BE RAISED IN VIOLATION OF A RULE REQUIRING IT TO BE RAISED PRIOR TO TRIAL.

Petitioner concedes that the first challenge to the constitutionality of the statute under which he was convicted was made by a motion for judgment of acquittal pursuant to Rule 755 of the Maryland Rules of Procedure, following completion of the State's case. The Court of Special Appeals of Maryland, on appeal, held that the issue was required to be raised prior to trial pursuant to Rule 725 (b) of the Maryland Rules of Procedure; that the function of a motion for judgment of acquittal was solely to challenge the sufficiency of the evidence to convict; and that in any event the issue of constitutionality involved mixed questions of fact and law and could not be reviewed on appeal in the absence of any evidence.

Petitioner, relying primarily on *Henry v. Mississippi*, 379 U.S. 443 (1965), claims that his failure to comply with Rule 725 (b), *supra*, may not foreclose a constitutional attack on the statute. In this connection, he suggests that the rule requiring the constitutionality issue to be raised prior to trial was "not previously clearly announced and never before applied".

Henry v. Mississippi, supra, held that "* * * a litigant's procedural defaults in state proceedings do not prevent

vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest", 379 U.S. at 447. The more general statement of the rule has been that review by this Honorable Court is barred if the decision of the state court rests on an independent or adequate state ground. *Zorach v. Clauson*, 343 U.S. 306, footnote 7; *Ellis v. Dixon*, 349 U.S. 458, 463; *Sullivan v. Little Hunting Park*, 396 U.S. 229, dissenting opinion at 244. This Court has most recently stated in *Parker v. North Carolina*, 397 U.S. 790 at 798:

> "We also have before us the question whether the indictment to which Parker pleaded is invalid because members of his race were allegedly systematically excluded from the grand jury which returned the indictment. The North Carolina Court of Appeals refused to consider the claim since under North Carolina law an objection to the composition of the grand jury must be raised by motion to quash the indictment prior to the entry of the guilty plea. Because Parker had failed to raise his objection in timely fashion, relief was unavailable. This state rule of practice would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review. * * *. We are under similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief."

There can be little doubt that the procedural rule, virtually identical to Federal Rule of Criminal Procedure 12 (b)(2), serves a legitimate state interest, once it is understood that a defense of, as well as an attack on the constitutionality of a statute often, as in this case, requires the introduction of evidence. The state cannot reasonably be expected to proceed to trial in every criminal case with evidence and witnesses lined up and standing by, on the mere chance that a challenge to the constitutionality

of the statute involved *might* be made during the trial. Where the issue is raised after the trial has commenced the state cannot, under the prohibitions of double jeopardy, terminate the trial to engage in a search for witnesses and evidence. Similarly, to interrupt a trial, possibly for a long period of time, while this search for evidence is conducted, can cause a serious interruption to the continuity of the trial, can break the jurors' train of concentration, and could be grossly wasteful of the jurors' time.

Petitioner cannot take the position that this issue could have been resolved without the introduction of evidence in view of the extensive amount of "evidence" he attempted, improperly, to inject into this case, for the first time, on appeal to the Court of Special Appeals, by attachments to his brief. See also Appendix E in Petitioner's brief to this Honorable Court. Although Petitioner attempted a broader attack on the entire statute, the sole portion of the statute at issue was the requirement that abortions be performed only "in a hospital accredited by the joint commission for accreditation of hospitals and licensed by the State Board of Health and Mental Hygiene", since this is the only part of the statute Petitioner was charged with violating. In his brief on direct appeal, Petitioner alleged that this requirement was "void for vagueness, uncontrolled delegation of legislative authority and unjustifiable discrimination with respect both to physicians and to their patients". One may look no further than to Petitioner's Appendix E, for example, to realize that substantial evidentiary facts are involved in ruling on merely the alleged discrimination argument. As previously stated, the State cannot be expected to have testimony and evidence at hand to controvert the possible evidence of a defendant on the *chance* that the issue will be raised. The rule clearly serves a legitimate state interest.

Petitioner makes the further contention that the requirement that the constitutional challenge be made pre-trial was not "previously clearly announced and never before applied". In fact, the requirement that such a challenge be made prior to trial has existed in Maryland, either by statute or rule of court, without interruption since Chapter 63 of the Laws of Maryland of 1852. (Respondent's Appendix A.) In *Foote v. State*, 59 Md. 264 (1883), at 266, it was stated:

> "Since the Act of 1852, Chapter 63, the usual and only proper mode of testing the constitutionality of an Act of Assembly under which a party is indicted, is by demurrer to the indictments."

See also, to the same effect, *Cowman v. State*, 12 Md. 236 (1858); *State v. Lassotovitch*, 162 Md. 147, 159 A. 362 (1932); Gould, Criminal Pleading in Maryland, page 74 (Vail-Ballou Press, 1936); and *Bonneville v. State*, 206 Md. 302, 111 A. 2d 669 (1955), where the Court stated at page 671:

> "As a matter of procedure, a motion to dismiss the indictment under Rule 3 of the Rules of Criminal Practice and Procedure, which has susperseded a demurrer in cases where a demurrer would previously have been appropriate, is proper to test the sufficiency of the indictment."

The Act of 1852 was superseded by Rule 3 of the General Rules of Practice and Procedure (Respondent's Appendix B), which was adopted December 6, 1949 effective January 1, 1950. Rule 3 was recodified, without substantive change, as Rule 725 effective January 1, 1957. For an analogous application of Rule 725 (b) see *Martel v. State*, 221 Md. 294, 157 A. 2d 437, cert. den. 363 U.S. 849 (1960).

It should be added that it has been held repeatedly that the sole function of Rule 755 is to test the sufficiency of

the evidence. *Williams & McClelland v. State*, 5 Md. App. 450, 247 A. 2d 731 (1968); *Gray v. State*, 4 Md. App. 175, 241 A. 2d 909 (1968).

However, Petitioner's procedural defaults were not the only reason the Maryland Court of Special Appeals felt unable to rule on the constitutional issue. Equally controlling was the complete absence of evidence. The court said (page 15a of Petitioner's brief):

> "But it would be foolhardy in the extreme to undertake the resolution of such complex constitutional questions upon a record as procedurally and substantively deficient as that now before us — one in which the constitutional questions, though readily apparent prior to trial, were raised for the first time after the State had concluded its case-in-chief, and then only by an inappropriate motion (generally alleging unconstitutionality along a front far more limited in thrust than that presently sought to be aired), submitted without comment, or illuminating argument."

Further, the Court stated (page 17a of Petitioner's brief):

> "We believe such issues are most appropriately determined upon pretrial motion and on a record there to be made which would provide the relevant evidentiary background so essential to place the constitutional questions in proper focus and perspective, and thus to insure a reasoned constitutional decision."

See also in this regard *Ellis v. Dixon, supra*, at page 464; *United States v. International Union*, 352 U.S. 567, 591; *State v. Cherry*, 224 Md. 144, 154, 167 A. 2d 328 (1961).

Petitioner, however, asserts that Maryland women and physicians have been deprived of adjudication of the underlying issues of social and constitutional importance with respect to abortions and requests that the case be remanded

for that reason. While this may, or may not, appear persuasive as a reason for remand, no authority is cited holding this to be a *ground* for remand by this Honorable Court. Furthermore, the broad social issues could not be resolved in this case since, as noted *supra*, only the narrow issue of the licensed and accredited hospital requirement is involved in this case.

There is a further reason why a remand would be most inappropriate in this case to attempt to determine these broad social issues. These issues revolve primarily around claimed rights, including the right of privacy, of a woman, and allegedly affect doctors by virtue of a physician-patient relationship, as an extension of *Griswold v. Connecticut*, 381 U.S. 479. The constitutional issues sought to be raised by Petitioner are relevant to him only through this claimed physician-patient relationship with a pregnant woman.

Petitioner, however, not only testified that he did not perform an abortion on the girl in question and that he did not counsel her as to treatment or termination of her pregnancy, he denied that she was even pregnant. How, then, can these constitutional issues be properly raised and developed by Petitioner on remand in light of that testimony? This further indicates the propriety of the matter being aired prior to trial.

CONCLUSION

The Maryland rule requiring that a challenge to the constitutionality of a criminal statute be made by a motion prior to trial is a continuation of the law which has existed in Maryland since 1852. It cannot therefore be described as a law never before announced or applied. The rule serves a legitimate purpose in that it enables the state the opportunity to seek and obtain relevant evidence without the risk of double jeopardy or of undue interruption during

trial. No adjudication of important social and constitutional issues could be resolved upon a remand even assuming that such consideration constituted an adequate ground for that relief. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
FRANCIS X. PUGH,
Assistant Attorney General
of Maryland,
For Respondent.

APPENDIX A

Chapter 63, Section 2, of the Laws of Maryland of 1852, codified as Article 27, Section 649, Annotated Code of Maryland (1939)

649. No indictment or presentment for felony or misdemeanor shall be quashed, nor shall any judgment upon any indictment for any felony or misdemeanor, or upon any presentment, whether after verdict, by confession or otherwise, be stayed or reversed for the want of a proper or perfect venue, when the court shall appear by the indictment, inquisition or presentment, or by the statement of the venue in the margin thereof to have jurisdiction over the offense, nor for the omission or misstatement of the title, occupation or degree of the defendant or other person or persons named in the said indictment, inquisition or presentment nor, for the want of the averment of any matter unnecessary to be proved, nor for the omission of the words "as appears by the record," or of the words "with force and arms," nor for the insertion of the words "against the form of the statute," instead of "against the form of the statutes," or *vice versa*, nor for omitting to state the time at which the offense was committed in any case where time is not of the essence of the offense, nor for stating the time imperfectly, nor for stating the offense to have been committed on a day subsequent to the finding of the indictment or making the presentment, or on an impossible day, or on a day that never happened, or by reason of any mere defect or imperfection in matters of form which shall not tend to the prejudice of the defendant, nor for any matter or cause which might have been a subject of demurrer to the indictment, inquisition or presentment.

APPENDIX B

Rule 3, General Rules of Practice and Procedure of Maryland (effective January 1, 1950 until recodified as Maryland Rule 725 on January 1, 1957).

Rule 3. Pleadings and Motions Before Trial; Defenses and Objections.

(a) *Pleadings and motions.* Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, not guilty by reason of insanity as provided by statute, guilty and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief.

(b) *The motion raising defenses and objections.*

(1) *Defenses and objections which may be raised.* Any defense or objection which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and objections which must be raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of making motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. All issues of fact raised by such motions may be determined by the court without a jury or on affidavits or in such other manner as the court may direct.

(5) *Effect of determination.* If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information.

(6) *Motion in writing.* A motion other than one made during a trial or a hearing shall be in writing. It shall state the grounds upon which it is made and shall set forth the relief or order sought.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 18 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-109

No. 1533

MILAN M. VUITCH, M.D., *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

REPLY BRIEF

ROY LUCAS
Four Patchin Place
New York, New York 10011
(212) 691-2020

E. BARRETT PRETTYMAN, JR.
TIMOTHY J. BLOOMFIELD
815 Connecticut Avenue, N.W.
Washington, D. C. 20006
(202) 298-5500

Attorneys for Petitioner

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1533

MILAN M. VUITCH, M.D., *Petitioner,*

v.

STATE OF MARYLAND, *Respondent.*

REPLY BRIEF

In his Brief in Opposition, the Attorney General of Maryland argues that the procedural rule enforced in petitioner's case serves a legitimate state interest and has been in effect since 1852. This rule provides that a pretrial motion is the *only* vehicle by which a criminal defendant can question the validity of the governing statute. Applied to petitioner's case, this rule blocked state court adjudication of important public and constitutional issues which were raised three times at trial and four times on direct appeal.

Clearly, no legitimate state interest abides in so drastic an application of a procedural rule which is not "clearly announced to defendant and counsel." *Henry* v. *Mississippi,* 379 U.S. 443, 448 n. 3 (1965).[1] Contrary to the Attorney General's contentions, Maryland has not insisted since 1852 that a defendant lose his right to question the validity of a criminal statute by failing to do so by pretrial motion.

Chapter 63 of the Laws of Maryland of 1852[2] did provide explicitly that no judgment should be reversed for any reason which might have been the subject of demurrer to the indictment, and in 1858, this rule was applied to bar an attack on a statute. *Cowan* v. *State,* 12 Md. 236 (1858). But that was the last time that the rule was enforced—until petitioner's case. Indeed, in *Foote* v. *State,* 59 Md. 264 (1883), quoted by the Attorney General, the appellate court considered the constitutionality of a statute which had not been attacked by demurrer.[3]

In 1949, Chapter 63 was superseded by Rule 3, which was substantively the same as the present Rule 725 (b).[4] Neither rule provided that an objection to an

---

[1] In *Parker* v. *North Carolina,* 397 U.S. 790, 798 (1969), relied on by the Attorney General, the procedural rule was explicit, and there could be no misunderstanding of it. That is not the case here.

[2] See Respondent's Exhibit A.

[3] *State* v. *Lassotovitch,* 162 Md. 147, 159 A. 362 (1932), also relied upon by the Attorney General, is simply an example of a situation where a statute *was* attacked by demurrer, and does not support the proposition it is cited for—that the right to question a statute is forever lost unless asserted before trial.

[4] Effective January 1, 1950, Rule 3 is Respondent's Appendix B.

unconstitutional statute was waived unless asserted before trial. Indeed, each provided that "lack of jurisdiction" or "failure to change an offense" [5] could be noticed at any time. Thus a rule which may have been explicit — if seldom enforced — in 1852 was abandoned, in appearance at least, in 1949. In substance, too, the rule was abandoned, for neither we nor the Attorney General have found any case since then—other than petitioner's—in which the rule was applied to block consideration of a challenge to a statute which was raised at trial, albeit by other procedural vehicles.

In *Henry* v. *Mississippi, supra,* this Court stated:

> In every case we must inquire whether the enforcement of a procedural forfeiture serves such a [legitimate] state interest. [379 U.S. at 447.]

Petitioner raised the question on which he desires a decision three times at trial. As in *Henry,* the purpose of the procedural rule was substantially served. Whatever its merits in the abstract or for the future, the rule invoked by the Attorney General serves no legitimate interest here, where it was previously neither enforced or clearly announced.

In his Brief in Opposition, the Attorney General notes also the Maryland court's concern that the record did not contain evidence appropriate for constitutional adjudication. Recognizing this, petitioner sought remand for an evidentiary hearing on the important constitutional issues involved herein—under

---

[5] The unconstitutionality of a statute constitutes a "failure to state an offense" under Rule 12 of the Federal Rules of Criminal Procedure, which the Maryland court noted was virtually the same as Rule 725. 8 *Moore, Federal Practice* ¶ 12.03[2].

a rule specifically authorizing remand where "the substantial merits of a case will not be determined" otherwise.[6] Petitioner seeks no more here.

Respectfully submitted,

ROY LUCAS
Four Patchin Place
New York, New York 10011
(212) 691-2020

E. BARRETT PRETTYMAN, JR.
TIMOTHY J. BLOOMFIELD
815 Connecticut Avenue, N.W.
Washington, D. C. 20006
(202) 298-5500

Attorneys for Petitioner

[6] Rule 1071 of the Maryland Rules of Procedure.